

NOTES

NATIONWIDE INJUNCTIONS AGAINST THE FEDERAL GOVERNMENT: A STRUCTURAL APPROACH

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*When a court invalidates a federal government policy, it must then decide the scope of the remedy. A common remedy is an injunction—a judicial order prohibiting enforcement of the policy. Traditionally, lower federal courts enjoined the government only from enforcing the invalidated policy against the victorious plaintiff, leaving it in place against other members of the public. A nationwide injunction, however, forbids the government from enforcing the policy against anyone in the country, effectively taking the policy out of circulation. This Note argues that nationwide injunctions contravene three core structural principles of the federal courts: (1) the regional design of the courts of appeals without intercircuit stare decisis, (2) the Supreme Court’s holding in *United States v. Mendoza* that the federal government is not subject to non-mutual issue preclusion, and (3) the doctrine of intercircuit nonacquiescence. It concludes that nationwide injunctions against the federal government should be disfavored and that such injunctions should not extend beyond the circuit of the enjoining court. Simply put, lower federal courts should not make nationwide law.*

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INTRODUCTION

The President issues an executive order. It bars immigrants from seven predominantly Muslim countries. A lawsuit is quickly filed. A judge decides that the plaintiff’s argument has merit, and issues an injunction prohibiting enforcement of the executive order.¹ But what should the geographic scope of the injunction be? Should the court forbid the government from implementing the policy against this plaintiff only? Against anyone in the district? Anyone in the circuit? The entire country?

The answer has become unnecessarily political. Traditionally, injunctions forbade the government only from enforcing the invalidated policy against the victorious plaintiff, leaving the government free to enforce it against other members of the public.² A nationwide injunction, however, forbids the government from enforcing the policy

¹ See *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017), *stay denied*, 847 F.3d 1151 (9th Cir. 2017) (enjoining the United States from enforcing certain sections of President Trump’s travel ban executive order); *Int’l Refugee Assistance Project v. Trump*, No. TDC-17-0361, 2017 WL 1018235, at *17-18 (D. Md. Mar. 16, 2017) (issuing nationwide injunction against part of the revised version of the travel ban); *Hawai’i v. Trump*, CV. NO. 17–00050 DKW–KSC, 2017 WL 1167383, at *9 (D. Haw. Mar. 29, 2017) (issuing nationwide injunction against other parts of the revised travel ban); see also *County of Santa Clara v. Trump*, No. 17-cv-00574-WHO, 2017 WL 1459081, at *22 (N.D. Cal. Apr. 25, 2017) (issuing nationwide injunction against executive order denying federal funding to “sanctuary cities”). The court in *Washington v. Trump* technically issued a temporary restraining order, but it is functionally the same as an injunction because it prohibited the government from enforcing the challenged policy. See *Washington v. Trump*, 847 F.3d at 1158 (holding that the temporary restraining order is appealable because it “possesses the qualities of an appealable preliminary injunction”).

² See *infra* Part I (reviewing the history of nationwide injunctions).

against anyone, plaintiff or not, effectively taking the policy out of circulation.³ Nationwide injunctions are a recent and controversial phenomenon.⁴ During the George W. Bush administration, environmental groups sought—and were granted—nationwide injunctions in California federal district courts against agency actions while the administration argued for judicial restraint.⁵ During the Obama administration, the roles were reversed, with conservatives seeking—and receiving—nationwide injunctions in Texas federal courts against a host of Obama administration policies while liberals decried judicial obstructionism.⁶ Now that power in Washington has switched hands again, the arguments have reversed once more.⁷ Clearly, a more

³ Of course, the ruling would still be subject to appeal. *See infra* note 96 (discussing appealability).

⁴ For the purposes of the claims made in this Note, “nationwide injunction” is defined as a judicial order in a non-class action lawsuit prohibiting the federal government from enforcing a statute, rule, or policy against anyone in the country. *See infra* Part I.B (discussing this Note’s use of the term nationwide injunction). This Note focuses primarily on injunctions issued by district courts, but the analysis applies equally to injunctions issued by the federal courts of appeals. As the primary fact finders, district courts are usually the ones issuing injunctions, which are then reviewed by the courts of appeal. Appellate courts, however, can and do issue broad injunctions of their own. *See, e.g., In re EPA & Dep’t of Def. Final Rule (In re Clean Water Rule)*, 803 F.3d 804, 805, 808–09 (6th Cir. 2015) (issuing a nationwide stay against an EPA and Army Corps of Engineers rule defining “waters of the United States,” as used in the Clean Water Act). Injunctions issued by the Supreme Court, however, are not the subject of this Note, as none of the concerns discussed here apply in that context.

⁵ *See infra* note 55 (listing cases where California courts enjoined environmental policies during the Bush administration); *infra* note 69 (discussing a brief by then-Solicitor General Clement considering the propriety of the nationwide injunction).

⁶ *See infra* note 56 (listing cases where Texas district courts enjoined Obama administration policies); *see also, e.g.,* Kerry Eleveld, *How Conservative Federal Judges in Texas Are Putting a Stranglehold on President Obama’s Policies*, DAILY KOS (Oct. 27, 2016, 2:16 PM), <http://www.dailykos.com/story/2016/10/27/1587515/-How-conservative-federal-judges-in-Texas-are-putting-a-stranglehold-on-President-Obama-s-policies> (“An unsettling pattern has emerged in Texas . . . [J]udges from the most conservative circuit in the nation are overriding the federal government and dictating policy nationwide from their benches in Texas.”). The most prominent injunction halted the Obama administration’s signature immigration initiatives, known as DAPA and DACA, which would have provided legal status to millions of undocumented immigrants. *See infra* notes 56–57 and accompanying text (discussing DAPA and DACA and the Texas district court injunction).

⁷ *Compare, e.g.,* Allen Henry, *AL Immigration Lawyers, Lawmakers React to SCOTUS Immigration Ruling*, WRBC (June 23, 2016, 3:59 PM), <http://www.wbrc.com/story/32294159/alabama-immigration-lawyers-lawmakers-react-to-scotus-immigration-ruling> (quoting then-Senator Jeff Sessions applauding the nationwide injunction against DAPA because it “stopped the Obama Administration from proceeding with its lawless immigration system”), *with* Charlie Savage, *Jeff Sessions Dismisses Hawaii as ‘an Island in the Pacific,’* N.Y. TIMES (Apr. 20, 2017), <https://nyti.ms/2p1ugyz> (quoting now-Attorney General Jeff Sessions as saying “I really am amazed that a judge sitting on an island in the Pacific can issue an order that stops the president of the United States from what appears to be clearly his statutory and constitutional power”). *See also* *The Ninth Circuit’s Power*

principled approach is needed.⁸

Neither the courts nor the academy have really dealt with the issue to date.⁹ There is no coherent doctrine or consistent precedent guiding a court's decision on the scope of an injunction.¹⁰ Despite the far-reaching impact of nationwide injunctions, courts often treat injunctive scope as an afterthought, sometimes discussing it only in a short paragraph, sentence, or footnote.¹¹ The Supreme Court has not yet weighed in on the issue, despite having had the opportunity to do so.¹²

This Note begins by comparing the advantages and disadvantages of nationwide injunctions. The advantages boil down to efficiency, uniformity, and complete relief. Nationwide injunctions avoid the cost of repetitive litigation, set a uniform nationwide rule, and ensure that the victorious plaintiff is never again burdened by the invalidated policy. But these advantages come at a high price. Nationwide injunctions freeze novel and difficult legal questions in conformance with the holding of a single lower court, hindering dialogue among the circuits and stunting the development of the law. This premature uniformity prevents worthy issues from reaching the Supreme Court because it inhibits circuit splits. Nationwide injunctions also create territorial tension among courts, since by definition they impose one court's opinion outside its jurisdiction, including places where local courts have held otherwise.¹³ Nationwide injunctions also incentivize

Grab, NAT'L REV. (Feb. 10, 2017 1:04 PM), <http://bit.ly/2kAGsUk> (characterizing the *Washington v. Trump* injunction as a "single, unelected jurist's usurpation of the power to make American national-security policy"). See generally Adam Liptak, *Trump's Losing Streak in Courts Is Traceable to Conservative Judges*, N.Y. TIMES (Apr. 27, 2017), <https://nyti.ms/2pqm9Mn> (discussing the switch in positions between the Obama and Trump administrations).

⁸ Cf. Daniel J. Walker, Note, *Administrative Injunctions: Assessing the Propriety of Non-Class Collective Relief*, 90 CORNELL L. REV. 1119, 1121 (2005) ("[T]he debate over the propriety of the administrative injunction generally takes place at the ideological extremes. Thus, there is a need to step back and assess the current state of the administrative injunction without falling into the stridency of either ideological commitment.").

⁹ For a literature review, see *infra* notes 23–28 and accompanying text.

¹⁰ See Walker, *supra* note 8, at 1134 ("Few court decisions discuss the propriety of the administrative injunction, and those that do often lack clarity."); see also *infra* Part I.D (reviewing case law).

¹¹ See *infra* notes 70–72 and accompanying text (reviewing cases giving short shrift to injunctive scope).

¹² See, e.g., *Summers v. Earth Island Inst.*, 555 U.S. 488, 500–01 (2009) ("Since we have resolved this case on the ground of standing, we need not . . . reach the question whether, if respondents prevailed, a nationwide injunction would be appropriate."); see also *U.S. Dep't of Def. v. Meinhold*, 510 U.S. 939, 939 (1993) (granting a stay and narrowing injunction to apply to plaintiffs only but without any explanation).

¹³ See *infra* Section III.C (discussing the risk of territorial clashes among courts).

extreme forum shopping, rewarding plaintiffs who steer cases to specific circuits, specific districts, and even specific judges. This gamesmanship threatens to paint the process of judicial review as an exercise in partisan politics.¹⁴

Faced with strong arguments for and against nationwide injunctions, this Note contends that the answer lies in the structure of the federal courts and the special institutional role of the government as a litigant. Three core structural features of the federal courts required congressional and judicial policymakers to weigh the same competing factors as in nationwide injunctions—uniformity and efficiency versus regional percolation. Each time, those policymakers decided that the value of intercircuit dialogue outweighs that of a quick and cheap nationwide decision.

The first structural feature is the organization of the regional courts of appeals and the lack of intercircuit stare decisis, designed to allow the law to develop differently in different circuits.¹⁵ Congress could have created nationwide intermediate appellate courts in which any panel's decision binds all lower courts nationwide. Such a structure would have prioritized uniformity and efficiency, just as nationwide injunctions do. But Congress instead created regional courts of appeals without intercircuit stare decisis because it placed a higher value on percolation and intercircuit dialogue.

The second structural feature stems from the Supreme Court's holding in *United States v. Mendoza* that the federal government is not subject to non-mutual issue preclusion.¹⁶ While a private litigant can be precluded from relitigating an issue lost in a prior suit, *Mendoza* held that the government is free to relitigate issues previously lost. The Court recognized that precluding government relitigation would yield efficiency and uniformity benefits similar to those of nationwide injunctions, but nonetheless rejected that position because it would “substantially thwart the development of important questions of law” and “deprive [the Supreme] Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before . . . grant[ing] certiorari.”¹⁷ Nationwide injunctions sabotage the policy judgment in *Mendoza* because it is very hard to relitigate a question once a nationwide injunction is issued.¹⁸

¹⁴ See *infra* Section III.E (discussing extreme forum shopping).

¹⁵ See *infra* Section IV.A (discussing the regional design of the courts of appeals).

¹⁶ 464 U.S. 154, 155 (1984).

¹⁷ *Id.* at 160.

¹⁸ See *infra* notes 96–97 and accompanying text (explaining how nationwide injunctions prevent relitigation).

The third structural feature is the doctrine of intercircuit nonacquiescence, under which federal agencies may continue to implement a policy in Circuit A even if Circuit B held that policy invalid.¹⁹ This, too, entailed a policy judgment that the benefits of intercircuit dialogue outweigh the efficiency and uniformity of a quick nationwide decision, and that the government should not be treated the same as a private litigant.²⁰ Nationwide injunctions flatly prohibit intercircuit nonacquiescence, a doctrine widely accepted by the courts.²¹

This Note proposes a solution: a rule that injunctions against the federal government should not extend beyond the circuit where the enjoining court sits. In most cases, an injunction barring enforcement against the plaintiff alone will suffice. But even when a court decides that a broader injunction is necessary, the injunction should not encroach onto other circuits. Put simply, lower courts should not make nationwide law.

The notion that a court's injunctive power should be geographically limited is a bit new, but it is consistent with the concerns and principles that necessitate drawing the line in the first place. The geographic boundaries of the circuits embody a congressional policy determination that they are large enough to create regional uniformity yet distinct enough to foster genuine percolation and intercircuit dialogue.²² Nonacquiescence likewise draws its boundaries along the lines of the geographic circuits, which highlights the stark difference between the lower courts' authority within their circuit and outside of it.

This Note's contribution to the literature is twofold. First, it is the only one to evaluate nationwide injunctions primarily through a structural lens, focusing on the institutional design of the regional circuits and the government's special role as a litigant. After decades of virtually no academic commentary on nationwide injunctions, several recent and forthcoming commentaries are beginning to fill the gap, but do so from very different perspectives. Professor Samuel Bray's forthcoming article delivers an insightful critique of nationwide injunctions, but his doctrinal inquiry focuses largely on how nationwide injunctions do not fit within the history and development of the

¹⁹ See Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989) (evaluating the desirability and legitimacy of nonacquiescence); *infra* Section IV.C.

²⁰ See Estreicher & Revesz, *supra* note 19, at 740–41 (arguing that rejection of intercircuit stare decisis legitimizes some forms of nonacquiescence).

²¹ See *infra* notes 160, 164 and accompanying text (discussing broad acceptance of intercircuit nonacquiescence).

²² See *infra* Part V.A (discussing the need for a geographic limitation).

courts of equity.²³ Other scholars grapple with similar issues, but in different contexts such as election law,²⁴ or class actions.²⁵ Second, unlike other commentators, whose solutions focus on the need to provide relief to the plaintiff,²⁶ this Note argues that a plaintiff-focused rule is easily circumvented and practically unfeasible, and that a geographic limitation is therefore necessary.²⁷ In other words, there should be a rule against nationwide injunctions even where limiting the injunction may diminish the plaintiff's relief.²⁸

²³ See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, HARV. L. REV. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2864175.

²⁴ Michael Morley raises analogous concerns with overbroad injunctions, but does so in the context of constitutional law, particularly voting rights and election suits. See Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL'Y 487 (2016) [hereinafter Morley, *De Facto Class Actions*].

²⁵ See Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 633–39 (2017) [hereinafter Morley, *Nationwide Injunctions*] (analyzing nationwide injunctions through the lens of the class action mechanism). Michelle Slack also analyzes the problem of granting overbroad relief when the government is a litigant, but does so in the context of certifying nationwide class actions against the government. See Michelle R. Slack, *Separation of Powers and Second Opinions: Protecting the Government's Role in Developing the Law by Limiting Nationwide Class Actions Against the Federal Government*, 31 REV. LITIG. 943 (2012) (proposing a presumption against certifying nationwide class actions against the government); see also *id.* at 961 n.103 (distinguishing between nationwide class actions and nationwide injunctions).

²⁶ Zayn Siddique provides an illuminating overview of nationwide injunctions, especially in discussing how courts fail to apply a coherent doctrine when deciding the scope of relief, but his conclusions differ from that of this Note. See Zayn Siddique, *Nationwide Injunctions*, 118 COLUM. L. REV. (forthcoming 2018), <http://ssrn.com/abstract=2801387>. While he argues in favor of plaintiff-focused injunctions in which the guiding principle is complete relief to the plaintiff, this Note takes the position that such a rule could be circumvented using institutional plaintiffs or state plaintiffs. See *infra* Part V.A (distinguishing between the two proposed solutions).

²⁷ Professor Bray's proposed solution likewise focuses on relief to plaintiffs, unlike this Note's geography-based rule. See *infra* Part V.A (distinguishing between the two proposed solutions). Daniel Walker similarly provides a potent critique of overbroad injunctions, including an informative history of administrative injunctions, and concludes with a list of factors courts should consider when fashioning the scope of relief. See Walker, *supra* note 8, at 1145–49 (laying out eight proposed factors).

²⁸ This Note would be incomplete if it did not address politics. Curtailing nationwide injunctions might help the Trump administration implement its regulatory agenda, just as it would have helped a Clinton administration do the same. The opposition to nationwide injunctions is not about political outcomes but about optimal decisionmaking and the role of the lower federal courts. Many of the injunctions that this Note considers overbroad were issued against the Obama administration by Texas courts favoring conservative plaintiffs, and this Note takes the position that a similar trend of injunctions by California courts favoring liberal plaintiffs would be equally improper. It is very difficult to maintain, in a principled way, that the DAPA injunction was wrong but the *Trump* injunction right, and vice versa. The salient issue in both—the appropriate scope of relief and the proper role of the lower courts—was essentially the same. This Note takes the position that both were wrong.

This Note proceeds as follows: Part I discusses the recent rise of the nationwide injunction and the attendant doctrinal uncertainty. Parts II and III review, respectively, the advantages and disadvantages of nationwide injunctions. Part IV argues that nationwide injunctions contravene the policy choices underlying the regional circuits, the *Mendoza* holding, and the doctrine of intercircuit nonacquiescence. Part V proposes a rule against enjoining the federal government beyond the circuit of the enjoining court.

I

DOCTRINAL ORIGIN AND RECENT DEVELOPMENTS

The injunction is one of the most formidable tools in a judge's toolkit. This Part discusses the contours of this equitable power, reviews the relatively recent trend of nationwide injunctions, and shows that the doctrine on this area of the law is incoherent.

A. *The Power to Enjoin*

The power to enjoin “is one recognized from ancient times and by indubitable authority.”²⁹ Originating as a narrow rule to prevent immediate and irreparable property harm, the injunction evolved into an all-purpose judicial remedy. Injunctions can be preliminary or permanent. Preliminary injunctions are designed to maintain the status quo during the litigation, while permanent injunctions are granted after the court decides on the merits.³⁰

As an equitable doctrine, injunctions are generally not governed by statute.³¹ The Federal Rules of Civil Procedure regulate the form and process of injunctive relief, but do not legislate their substance or scope.³² In deciding whether to grant an injunction, the basic frameworks are the Supreme Court's twin four-part tests for preliminary and permanent injunctions.³³ Both tests require that the harm be

²⁹ *In re Debs*, 158 U.S. 564, 599 (1895).

³⁰ See generally FED. R. CIV. P. 65 (describing different types of injunctions); *Permanent Injunction*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“An injunction granted after a final hearing on the merits.”).

³¹ Some aspects of federal injunctive practice are regulated by statute. For example, the Anti-Injunction Act, which prohibits federal court injunctions against state court proceedings. 28 U.S.C. § 2283 (2012) (“A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Acts of Congress, or where is necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”).

³² See FED. R. CIV. P. 65(d) (specifying the contents of an injunctive order and the parties that can be bound by it).

³³ See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (listing the standard for preliminary injunctions); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (listing the standard for permanent injunctions).

irreparable, that there be no other remedies available, and that the injunction be in the public interest, or at least not to the public detriment.³⁴ Generally, injunctions are supposed to be broad enough to afford “complete relief to the plaintiffs” but also “should be no more burdensome to the defendant than necessary to provide” that relief.³⁵ Decisions concerning injunctive scope are reviewed on appeal only for abuse of discretion.³⁶

B. Defining “Nationwide Injunction”

The term “nationwide injunction” is somewhat of a misnomer because it implies that its defining feature is that the injunction applies everywhere in the country. But while that is true, what makes nationwide injunctions controversial is not just that they apply *everywhere* in the country but that they regulate the defendant’s conduct as to *everyone* in the country—even if they were not party to the suit.³⁷

The mere fact that a lower court ruling regulates a litigant’s conduct outside its district is no problem at all. For example, if A successfully sues B over an ongoing harm, it is well accepted that a federal court in Iowa can enjoin B from harming A anywhere in the country. As long as the Iowa court has personal jurisdiction over B, it may regulate her conduct toward A even outside the court’s geographic district.³⁸

But the thornier question—the one this Note addresses—is whether a court can regulate the defendant’s conduct toward people not before the court. In the above scenario, if A successfully sues B,

³⁴ See *Winter*, 555 U.S. at 20; *eBay*, 547 U.S. at 391.

³⁵ *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

³⁶ See, e.g., *Guthrie Healthcare Sys. v. ContextMedia, Inc.*, 826 F.3d 27, 38 (2d Cir. 2016) (“We review the scope of a district’s court’s injunction for abuse of discretion, which can be found if the district court ‘relied upon a clearly erroneous finding of fact or incorrectly applied the law.’” (citation omitted)).

³⁷ Professor Bray, for the same reason, prefers the term “national injunction.” See Bray, *supra* note 23 (manuscript at 2 & n.4) (“No term is perfect. ‘Nationwide injunction’ is particularly inapt: it encourages a focus on territorial breadth, when the point of distinction is rather that the injunction applies to nonparties.”); see also Howard Wasserman, *Problems of Scope and Nomenclature in Nationwide Injunctions*, PRAWFSBLAWG (Apr. 26, 2017, 12:01 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/04/problems-of-scope-and-nomenclature-in-nationwide-injunctions.html> (arguing that “universal injunction” is a more appropriate term). I am sticking with “nationwide injunction” since that is the term used by courts and practitioners.

³⁸ See *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952) (“[T]he District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction.”); *United States v. AMC Entm’t*, 549 F.3d 760, 770 (9th Cir. 2008) (“Once a court has obtained personal jurisdiction over a defendant, the court has the power to enforce the terms of the injunction outside the territorial jurisdiction of the court, including issuing a nationwide injunction.”).

can a federal court in Iowa enjoin B from harming C, D, E, and everyone else in the country? Normally, such relief would be sought through a class action lawsuit where the lead plaintiff seeks relief for herself and all other similarly situated parties. A nationwide injunction, however, essentially grants classwide relief without an actual class action.

Since this Note focuses on injunctions against the federal government, it defines “nationwide injunction” as a judicial order in a non-class action lawsuit prohibiting the federal government from enforcing a statute, rule, or policy against anyone in the country.³⁹ In other words, Peter Plaintiff sues the EPA, Peter wins, and the court prohibits the EPA from enforcing the challenged policy against anyone anywhere.⁴⁰

C. *The Rise of the Nationwide Injunction*

Nationwide injunctions against the federal government are a fairly recent phenomenon.⁴¹ Through the middle of the 20th century, injunctions against the government only prohibited it from enforcing the rejected policy against specific plaintiffs.⁴² They did not enjoin the government from enforcing the rejected policy against anyone other than the plaintiff.⁴³

The phrase “nationwide injunction” made its first appearance in the case law in 1964,⁴⁴ and such injunctions were a relative rarity even

³⁹ For the sake of consistency, this Note uses the term “policy” to refer to challenged government actions, but the argument applies equally to other government actions, like statutes, regulations, adjudications, executive orders, or informal actions.

⁴⁰ Courts sometimes “stay” a rule instead of enjoining it, but for the purposes of this Note, a stay is functionally identical to a preliminary injunction in that it halts implementation of the rule. *See, e.g., In re EPA & Dep’t of Def. Final Rule*, 803 F.3d 804, 808–09 (6th Cir. 2015) (issuing nationwide stay of an EPA interpretation of the Clean Water Rule); *see also Kijowska v. Haines*, 463 F.3d 583, 589 (7th Cir. 2006) (describing a stay as “a form of injunction”).

⁴¹ For illuminating historical analyses of nationwide injunctions, see Bray, *supra* note 23 (manuscript at 20–39), and Walker, *supra* note 8, at 1124–34.

⁴² *See Bray, supra* note 23 (manuscript at 24) (“[I]n the nineteenth century, the idea of suing to restrain the enforcement of a federal statute everywhere in the nation seems not to have found any acceptance, and it may never even have been raised.”).

⁴³ Like most American equitable practices, the injunction originated in England, where it was mostly used to protect property rights in private suits. *See Walker, supra* note 8, at 1126–27 (describing the use of the injunction by courts of equity). Things began to change at the turn of the 20th century, when courts began issuing injunctions more expansively. *See id.* at 1129–31 (describing the use of the labor injunction). Courts also began issuing injunctions against government entities, most famously in school desegregation cases. *See id.* at 1131–32 (describing the use of the civil rights injunction).

⁴⁴ Based on searches performed on the Westlaw and Lexis Advance databases, the phrase first appears in *International Breweries, Inc. v. Anheuser-Busch, Inc.*, 230 F. Supp. 662, 663 (M.D. Fla. 1964), *aff’d*, 364 F.2d 261 (5th Cir. 1966), a trademark case concerning

then.⁴⁵ From that point until the 1980s, nationwide injunctions were isolated occurrences. In the 1990s and 2000s, they became more frequent and continued to gain prominence in the last few years of the Obama administration.⁴⁶ The subject matter of these injunctions included, for example, a school bathroom policy for transgender students,⁴⁷ hospice Medicare reimbursements,⁴⁸ a beef promotion initiative,⁴⁹ an anti-terrorism law,⁵⁰ and the U.S. military's "Don't Ask Don't Tell" policy.⁵¹ The most frequent casualties of nationwide injunctions seem to be environmental regulations,⁵² forestry regulations,⁵³ and, most recently, labor regulations.⁵⁴ During the George W. Bush administration, federal district courts in California took the lead,

beer advertising. It is unclear which was the first case to issue a nationwide injunction against the federal government, but a top contender is *Wirtz v. Baldor Electric Co.*, where the court held that "if one or more of the plaintiffs-appellees is or are found to have standing" to challenge a wage determination by the Department of Labor, "the District Court should enjoin the effectiveness of the Secretary's determination with respect to the entire industry." 337 F.2d 518, 535 (D.C. Cir. 1963).

⁴⁵ See Bray, *supra* note 23 (manuscript at 32–38) (discussing the evolution of the nationwide injunction).

⁴⁶ See *id.* at 39 (describing the current ubiquity of the nationwide injunction).

⁴⁷ *Texas v. United States*, 201 F. Supp. 3d 810, 815 (N.D. Tex. 2016).

⁴⁸ See *L.A. Haven Hospice, Inc. v. Sebelius*, No. CV08-4469-GW (RZX), 2009 WL 5865294, at *1 (C.D. Cal. Aug. 20, 2009) (discussing hospice cap liability), *aff'd in part, vacated in part*, 638 F.3d 644 (9th Cir. 2011).

⁴⁹ See *Livestock Mktg. Ass'n v. USDA*, 207 F. Supp. 2d 992, 1007 (D.S.D. 2002) (holding that requiring beef producers to pay for beef promotion advertising violated the First Amendment), *aff'd*, 335 F.3d 711 (8th Cir. 2003), *vacated on other grounds sub nom. Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005); see also Walker, *supra* note 8, at 1122 (discussing the case).

⁵⁰ See *Hedges v. Obama*, No. 12 Civ. 331 (KBF), 2012 WL 2044565, at *1, *3 (S.D.N.Y. June 6, 2012) (enjoining part of the National Defense Authorization Act on First and Fifth Amendment grounds), *vacated*, 724 F.3d 170 (2d Cir. 2013).

⁵¹ See *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 969 (C.D. Cal. 2010) (finding that the policy violated the First Amendment), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011); see also *infra* note 72 (discussing the injunction).

⁵² See, e.g., *In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804, 808–09 (6th Cir. 2015) (staying the Clean Water Rule); *Wyoming v. U.S. Dep't of the Interior*, 136 F. Supp. 3d 1317, 1354 & n.52 (D. Wyo. 2015) (enjoining a regulation related to hydraulic fracturing); *Am. Mining Cong. v. U.S. Army Corps of Eng'rs*, 962 F. Supp. 2, 4 (D.D.C. 1997) (enjoining a rule governing dredging activities).

⁵³ See, e.g., *Sequoia Forestkeeper v. Tidwell*, 847 F. Supp. 2d 1244, 1253 (E.D. Cal. 2012) (enjoining Forest Service regulations); *Citizens for Better Forestry v. USDA*, No. C 05-1144 PJH, C 04-4512 PJH, 2007 WL 1970096, at *19 (N.D. Cal. July 3, 2007) (same); *Heartwood, Inc. v. U.S. Forest Serv.*, 73 F. Supp. 2d 962, 977–80 (S.D. Ill. 1999) (enjoining a timber harvesting rule).

⁵⁴ See *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520, 534 (E.D. Tex. 2016) (enjoining overtime rule); *Associated Builders & Contractors of Se. Tex. v. Rung*, No. 1:16-CV-425, 2016 WL 8188655, at *15 (E.D. Tex. Oct. 24, 2016) (enjoining government contractor disclosure rule); *Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-CV-00066-C, 2016 WL 3766121, at *46 (N.D. Tex. June 27, 2016) (enjoining rule on union persuaders).

enjoining various environmental policies.⁵⁵ During the Obama administration, Texas federal district courts issued nationwide injunctions with particular zeal.⁵⁶ The most prominent of those halted parts of President Obama's signature immigration initiatives, known as DAPA and DACA, which would have provided legal status to millions of undocumented immigrants.⁵⁷ The pendulum has swung back in the early months of the Trump administration with nationwide injunctions against Trump's travel bans and the injunction against his plan to defund sanctuary cities.⁵⁸

D. Doctrinal Disarray

There is no coherent doctrine or unifying principle on whether, when, and how nationwide injunctions should be issued. It is generally accepted that nationwide injunctions are not per se unlawful,⁵⁹ but the clarity ends there. There is a panoply of conflicting holdings and doctrines justifying both broad and narrow injunctions in virtually every case.⁶⁰

⁵⁵ See, e.g., *Citizens for Better Forestry*, 2007 WL 1970096, at *19 (enjoining a forestry rule); *California ex rel. Lockyer v. USDA*, 468 F. Supp. 2d 1140, 1144 (N.D. Cal. 2006) (enjoining repeal of the Roadless Rule), *aff'd*, 575 F.3d 999 (9th Cir. 2009); *Earth Island Inst. v. Ruthenbeck*, No. CIV F-03-6386 JKS, 2005 WL 5280466, at *1–2 (E.D. Cal. Sept. 20, 2005) (enjoining Forest Service regulations).

⁵⁶ See, e.g., *Dialysis Patient Citizens v. Burwell*, No. 4:17-CV-16, 2017 WL 365271, at *6 (E.D. Tex. Jan. 25, 2017) (enjoining rule requiring dialysis providers to make certain disclosures); *Franciscan All., Inc. v. Burwell*, No. 7:16-CV-00108-O, 2016 WL 7638311, at *22 (N.D. Tex. Dec. 31, 2016) (enjoining regulation prohibiting discrimination on the basis of gender identity or termination of pregnancy); *Nevada*, 218 F. Supp. 3d at 534 (enjoining Department of Labor overtime rule); *Texas v. United States*, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016) (enjoining Department of Justice guidance on transgender bathrooms in schools); *Texas v. United States*, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015) (enjoining parts of DACA and DAPA), *aff'd*, 136 S. Ct. 2271 (2016); *Nat'l Fed'n of Indep. Bus.*, 2016 WL 3766121, at *46 (enjoining Department of Labor rule on union persuaders); *Associated Builders & Contractors of Se. Tex.*, 2016 WL 8188655, at *15 (enjoining Department of Labor rule requiring government contractor to make certain disclosures).

⁵⁷ *Texas v. United States*, 86 F. Supp. 3d at 677–78.

⁵⁸ See *supra* note 1 (listing cases).

⁵⁹ Michael Morley argues that plaintiffs lack Article III standing to seek an injunction protecting anyone other than themselves. See Morley, *De Facto Class Actions*, *supra* note 24, at 523–27. One undocumented immigrant affected by the DAPA injunction similarly argued in a complaint filed in the Eastern District of New York that “Texas and the other plaintiffs lack standing to obtain, and the District Court in *Texas v. United States* lacked jurisdiction or authority to enter, an injunction reaching to New York.” Complaint at 1, *Vidal v. Baran*, No. 1:16-CV-04756, 2016 WL 4524062 (E.D.N.Y. Aug. 25, 2016). However, courts have yet to accept this theory. See, e.g., *Heartwood, Inc. v. U.S. Forest Serv.*, 73 F. Supp. 2d 962, 980 (S.D. Ill. 1999) (rejecting the argument that “plaintiffs lack standing to seek and receive a nationwide injunction as a consequence of their claims”).

⁶⁰ See Bray, *supra* note 23 (manuscript at 37–38) (discussing a breakdown of “the distinction between legal and practical effect” in these cases); Siddique, *supra* note 26 (manuscript at 23) (explaining that “[c]ases that appear alike reach contradictory results

A prime example is the oft-cited instruction by the Supreme Court in *Califano v. Yamasaki* that “injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”⁶¹ Many courts quote *Yamasaki* to support the issuance of narrow injunctions, emphasizing the “no more burdensome to the defendant than necessary” part.⁶² Other courts, however, cite the same language in support of broad injunctions by focusing on the “complete relief” part of the sentence to reason that broad injunctions are permitted if necessary to completely redress the plaintiff’s grievance.⁶³ Both arguments, however, overstate the applicability of *Yamasaki*, which was about class actions rather than nationwide injunctions.⁶⁴

Beyond *Yamasaki*, there is further uncertainty in the case law. Some courts have held nationwide injunctions inappropriate in the absence of a class action; others have not.⁶⁵ Some courts interpret the Administrative Procedure Act as calling for nationwide injunctions; others do not.⁶⁶ Some courts distinguish between facial and as-applied

and judges offer limited or conflicting explanations” in public law cases involving nationwide injunctions).

⁶¹ 442 U.S. 682, 702 (1979).

⁶² See, e.g., *Meinhold v. U.S. Dep’t of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994) (denying nationwide injunction) (citing *Yamasaki*, 442 U.S. at 702); *Hospice of N.M., LLC v. Sebelius*, 691 F. Supp. 2d 1275, 1294 (D.N.M. 2010) (same) (citing *Yamasaki*, 442 U.S. at 702).

⁶³ See, e.g., *Nevada v. U.S. Dep’t of Labor*, 218 F. Supp. 3d 520, 533–34 (E.D. Tex. 2016) (granting nationwide injunction) (citing *Yamasaki*, 442 U.S. at 702, 705); *Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 7852331, at *2 (N.D. Tex. Oct. 18, 2016) (clarifying scope of injunction) (citing *Yamasaki*, 442 U.S. at 702).

⁶⁴ See *infra* Part V.A and note 182 (discussing *Yamasaki*); see also Walker, *supra* note 8, at 1135–38 (arguing that “it is misleading to rely upon [*Yamasaki*] in discussing the appropriate scope of an administrative injunction” and characterizing *Yamasaki* as simply “suggest[ing] that the courts should apply a narrowing presumption when determining the scope of administrative injunctions”).

⁶⁵ Compare *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987) (“[A]n injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit . . . if such breadth is necessary to give prevailing parties the relief to which they are entitled.”) (italics removed), with *McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) (“A wrong done to plaintiff in the past does not authorize prospective, class-wide relief unless a class has been certified. Why else bother with class actions?”). The Supreme Court, in dictum, made an offhand observation in a case that “[r]espondents in this case do not represent a class, so they could not seek to enjoin such an order on the ground that it might cause harm to other parties.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 163 (2010); see also Siddique, *supra* note 26 (manuscript at 29 n.144) (discussing the case).

⁶⁶ Compare *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007) (holding that nationwide injunction was “compelled by the text of the Administrative Procedure Act” because it calls for courts to “set aside” invalid agency action), with *Virginia Soc’y for Human Life, Inc. v. FEC*, 263 F.3d 379, 394 (4th Cir. 2001) (holding that “[n]othing in the language of the APA” calls for a nationwide injunction), and Brief for Petitioner at 40–47,

challenges; others do not.⁶⁷ In the words of one commentator, “[t]here is no rule against national injunctions; nor is there a rule requiring them. . . . As with Karl Llewellyn’s famous dueling canons, there is always a principle available on both sides.”⁶⁸ While the Supreme Court had the opportunity to address the question in 2009, it ultimately decided that case on alternative grounds.⁶⁹

Many courts treat injunctive scope as a procedural afterthought and review it only in passing.⁷⁰ Some impactful injunctions are discussed only in a couple of sentences or a footnote, glossing over important line-drawing problems.⁷¹ Some nationwide injunction opinions even fail to mention that they apply nationwide, and their real scope could be determined only by a motion to clarify or by looking at the attached judgment or order.⁷²

Summers v. Earth Island Inst., 555 U.S. 488 (2009) (No. 07-463), 2008 WL 976399 (arguing that the text of the APA does not justify, let alone compel, a nationwide injunction).

⁶⁷ Compare, e.g., Franciscan All., Inc. v. Burwell, No. 7:16-CV-00108-O, 2016 WL 7638311, at *22 (N.D. Tex. Dec. 31, 2016) (“[A] nationwide injunction is appropriate when a party brings a facial challenge to agency action.”), with Los Angeles Haven Hospice, Inc. v. Sebelius, 638 F.3d 644, 665 (9th Cir. 2011) (holding that a nationwide injunction was inappropriate even though regulation was facially invalid).

⁶⁸ Bray, *supra* note 23 (manuscript at 39).

⁶⁹ See *Summers*, 555 U.S. at 500–01 (“Since we have resolved this case on the ground of standing, we need not . . . reach the question whether, if respondents prevailed, a nationwide injunction would be appropriate.”). The propriety of the nationwide injunction was one of the questions presented to the Court and was fully briefed by the Solicitor General, who focused on the text of the APA and the asymmetrical preclusion risk. See Brief for Petitioner, *Summers*, 555 U.S. 488 (No. 07-463), 2008 WL 976399.

⁷⁰ See *Morley, De Facto Class Actions*, *supra* note 24, at 492 (arguing that “[c]ourts have adopted inconsistent approaches” in determining injunctive scope and that “many courts either fail to recognize that they have a choice in the matter, or overlook most of the critical issues”).

⁷¹ See, e.g., *Livestock Mktg. Ass’n v. U.S. Dep’t of Agric.*, 335 F.3d 711, 726 (8th Cir. 2003) (affirming a nationwide injunction in two conclusory sentences); *Associated Builders & Contractors of Se. Tex. v. Rung*, No. 1:16-CV-425, 2016 WL 8188655, at *15 (E.D. Tex. Oct. 24, 2016) (confining the justification of a nationwide injunction to a single sentence that “[t]his court has authority to enjoin the implementation of [the agency rule] . . . on a nationwide basis and finds that it is appropriate to do so in this case” and citing *Texas v. United States* 809, F.3d at 188, the Fifth Circuit DAPA decision); *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1205 n.31 (C.D. Cal. 1998) (discussing the scope of an injunction in the final footnote); see also *Walker*, *supra* note 8, at 1120–21 & nn.7–8 (listing additional examples).

⁷² See e.g., *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 888 (C.D. Cal. 2010) (enjoining enforcement of the military’s “Don’t Ask, Don’t Tell” policy without specifying the scope of the injunction), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011). An accompanying, unpublished judgment, however, noted that the military is prohibited from enforcing the policy “against any person under their jurisdiction or command,” which effectively made it a worldwide injunction. *Log Cabin Republicans v. United States*, No. CV 04-08425-VAP (Ex), at 2 (C.D. Cal. Oct. 12, 2010), <http://lawprofessors.typepad.com/files/dadt-injunction.pdf> (judgment and permanent injunction order); see also *Hedges v.*

In sum, while nationwide injunctions are lawful, they are often granted (or denied) without applying a coherent or unified principle. But while injunctive scope may be an afterthought to many courts, it is an impactful decision that should be thoughtfully considered. Thus, simply asking whether nationwide injunctions are lawful is only half the question; to fully answer the question, one must examine the advantages and disadvantages of nationwide injunctions.

II

THE ADVANTAGES OF NATIONWIDE INJUNCTIONS

Nationwide injunctions are a potent tool that deliver relief to meritorious plaintiffs. This Part will examine the primary advantages of nationwide injunctions: efficiency, uniformity, and complete relief to the plaintiff.

A. *Judicial Efficiency*

Nationwide injunctions are a cost-effective way to resolve nationwide disputes. If the first court to decide a legal question issues a nationwide injunction, it conserves the cost and hassle of entertaining separate lawsuits all over the country. Of course, when used in this sense, “efficient” takes on a narrow definition denoting speed and cost rather than the optimal way to achieve the most accurate outcome.⁷³ Nevertheless, efficiency in general—including speed and cost—is a core value of our system of dispute resolution,⁷⁴ and nationwide injunctions certainly promote that value. This efficiency norm is often invoked to support nationwide injunctions.⁷⁵

Because of this efficiency, nationwide injunctions provide a robust mechanism for rights enforcement. The longer it takes to overturn a harmful policy, the more people are harmed. If every immigrant impacted by the travel ban had to file an individual suit, their

Obama, No. 12 CIV. 331, 2012 WL 2044565, at *3 (S.D.N.Y. June 6, 2012) (discussing scope of injunction on motion to clarify).

⁷³ See Slack, *supra* note 25, at 967–68 (distinguishing between “immediate efficiency” and “overall efficiency”).

⁷⁴ See FED. R. CIV. P. 1 (instructing that the Federal Rules of Civil Procedure “be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

⁷⁵ See, e.g., Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (affirming nationwide injunction because “refusal to sustain a broad injunction is likely merely to generate a flood of duplicative litigation”); Heartwood, Inc. v. U.S. Forest Serv., 73 F. Supp. 2d 962, 980 (S.D. Ill. 1999) (holding that there is “no option but to enjoin [a timber harvesting regulation] nationwide” because “[t]o do otherwise would invite further needless litigation on this particular [regulation], and the Court chooses to avoid that consequence”).

rights could be irreparably damaged in the interim. A nationwide injunction likewise prevents the enormous expense of litigating the same policy in many different forums.⁷⁶ In short, nationwide injunctions are excellent at righting wrongs quickly and efficiently.

B. *Nationwide Uniformity*

Another advantage of nationwide injunctions is uniformity. This norm can be divided into two parts: uniformity of the law in different regions of the country, and equal application of the law to plaintiffs and non-plaintiffs alike. Nationwide injunctions promote both types of uniformity.

Uniform application of federal law throughout the country is generally desirable.⁷⁷ Aside from novel or emerging questions of law, we want federal law to be the same in Montana as in Maryland. The pre-eminent engine of uniformity is, of course, the Supreme Court, which resolves splits among the courts of appeals.⁷⁸ But since the Supreme Court hears only a small fraction of cases,⁷⁹ broad injunctions are a mechanism by which the lower courts can institute a measure of geographic uniformity.⁸⁰

Nationwide injunctions also promote uniformity by providing equal status to plaintiffs and non-plaintiffs alike. For example, imagine Paula Plaintiff challenges the legality of an EPA emissions cap and wins. If the court only enjoins the EPA from applying the policy against Paula, the EPA cannot cap Paula's emissions but remains free to cap the emissions by Paula's neighbor—an outcome that seems

⁷⁶ See, e.g., *A-1 Cigarette Vending, Inc. v. United States*, 49 Fed. Cl. 345, 358 (2001) (“When a challenge is brought to the validity of a regulation . . . the district court’s determination will be binding upon the entire agency across the nation. . . . It would be senseless to require the relitigation of the validity of a regulation in all federal district courts. . . .”).

⁷⁷ See, e.g., Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1424–25 (1987) (“Uniformity promotes the twin goals of equity and judicial integrity—similar treatment of similar litigants secures equity, while it also inspires confidence in the legal system, a confidence crucial to the effective exercise of judicial power.” (quoting Laurie R. Wallach, Note, *Intercircuit Conflicts and the Enforcement of Extracircuit Judgments*, 95 YALE L.J. 1500, 1505 (1986) (quotation marks omitted))).

⁷⁸ See SUP. CT. R. 10 (listing circuit splits as one factor in the decision whether to grant certiorari).

⁷⁹ The Supreme Court’s docket has been steadily shrinking, from about 150 cases a year in the 1980s to about half that, partly because it is less interested in resolving circuit splits. See Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1636 (2008); see also Ryan J. Owens & David A. Simon, *Explaining the Supreme Court’s Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1271 (2012) (listing number of cases per term from 1940 to 2006).

⁸⁰ See *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015) (justifying nationwide injunction on the basis that Congress evinced a desire for immigration law to be uniform throughout the country).

unfair given that the policy was held invalid. Of course, Paula's neighbor can also sue the EPA—and will likely win given the favorable precedent created by Paula's suit—but the neighbor, and every other person subject to the policy, will have to incur the cost and hassle of litigation in order to vindicate their rights.⁸¹ This outcome is especially troubling because it disadvantages those who cannot afford the cost of litigation.⁸² As a result, wealthy people may be subject to less regulation than their poorer neighbors simply because they could afford to challenge an invalid policy. Nationwide injunctions remove this disparity by prohibiting the agency from enforcing the invalid policy against anyone, plaintiff or not.

C. Complete Relief to Plaintiffs

Another prominent rationale in favor of nationwide injunctions is that they provide complete relief to plaintiffs. Broad injunctions ensure that the plaintiff will never again be burdened by the unlawful policy not only directly but also indirectly.

For example, imagine a coal company successfully challenges an EPA policy limiting certain dredging activities. If the court's injunction prohibits EPA enforcement against the plaintiff but leaves the policy in place as to others, contractors hired by the plaintiff would still be subject to the policy. Only a nationwide injunction completely ensures that the victorious plaintiff gets full relief from the invalidated policy.⁸³

The complete relief rationale is especially salient in an age where so many administrative law challenges are brought by groups of states or large industry associations,⁸⁴ since a plaintiff-focused injunction

⁸¹ For example, in *Wirtz v. Baldor Electric Co.*, one of the earliest nationwide injunction cases, the D.C. Circuit held that so long as a single plaintiff has standing to challenge a wage determination rule, the district court should issue a nationwide injunction because “a court order enjoining the Secretary [of Labor]’s determination for the sole benefit of those [parties] who have standing to sue would be to give them an unconscionable bargaining advantage over other firms in the industry.” 337 F.2d 518, 534 (D.C. Cir. 1963).

⁸² See *Am. Mining Cong. v. U.S. Army Corps of Eng’rs*, 962 F. Supp. 2, 5 (D.D.C. 1997) (“[I]t is hard [to] see the fairness of a policy that would grant the benefits of this Court’s Opinion and Judgment only to those who can afford to file a separate (and wholly duplicative) suit in the District of Columbia.”).

⁸³ See *id.* (“[A] broad injunction is necessary to give plaintiffs the relief to which they are entitled. Without such relief, for example, plaintiff members who hire independent contractors who are not freed of the *Tulloch* rule would have to comply with that regulation . . .”).

⁸⁴ See Henry Gass, *Attorneys General Embrace Role as Check on Executive Power, on Right and Left*, CHRISTIAN SCI. MONITOR (Dec. 21, 2016), <https://www.csmonitor.com/USA/Justice/2016/1221/Attorneys-general-embrace-role-as-check-on-executive-power-on-right-and-left> (describing the rise in suits by state attorneys general).

might not completely redress these institutional actors' harms. This concern was at the heart of the Fifth Circuit's decision upholding the DAPA injunction in *United States v. Texas*.⁸⁵ Texas had challenged an agency directive granting some legal status for certain undocumented immigrants. The court held that a nationwide injunction was proper, in part because "there is a substantial likelihood that a [geographically-limited] injunction would be ineffective because DAPA beneficiaries would be free to move between states."⁸⁶ In other words, prohibiting DAPA implementation in Texas alone would not provide Texas complete relief because it could still be indirectly burdened by the invalidated policy.⁸⁷

III

THE DISADVANTAGES OF NATIONWIDE INJUNCTIONS

Nationwide injunctions can provide a quick, cheap, and comprehensive remedy to aggrieved plaintiffs. But there are serious drawbacks as well, particularly in the loss of intercircuit dialogue, the increased incentives to forum shop, the possibility of conflicting injunctions, and the uneven risks borne by the parties.

A. *Premature Freezing of the Law*

While uniform legal standards are beneficial in the long term, the adjudication of novel and difficult issues of law is better served by letting the question "percolate" among the lower federal courts. For that reason, short-term disuniformity among the lower federal courts is ubiquitous, tolerable, and even beneficial.⁸⁸ District courts are free to disagree with holdings by other district courts, and a court in Circuit A is free to disagree with holdings by Circuit B.⁸⁹ This short-term disuniformity is not a glitch, but a deliberate feature of our court

⁸⁵ *Texas v. United States*, 787 F.3d 733, 769 (5th Cir. 2015).

⁸⁶ *Id.*

⁸⁷ *See, e.g., Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987) ("an injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit . . . if such breadth is necessary to give prevailing parties the relief to which they are entitled.") (italics removed).

⁸⁸ *See, e.g., SAMUEL ESTREICHER & JOHN SEXTON, REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* 48 (1986) ("From the absence of a rule of intercircuit stare decisis . . . we derive a basic premise that disuniformity, at least in the short run, may be tolerable and perhaps beneficial.").

⁸⁹ *See Camreta v. Greene*, 563 U.S. 692, 709 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") (quoting 18 J. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 134.02[1][d] (3d ed. 2011)).

system.⁹⁰ In the words of Judge Richard Posner, “a difficult legal question is more likely to be answered correctly if it is allowed to engage the attention of different sets of judges deciding factually different cases than if it is answered finally by the first panel to consider it.”⁹¹ According to this view, short-term circuit splits are beneficial, not detrimental.

One benefit of percolation is that one court can critique the legal reasoning of another.⁹² If Circuit A reaches a decision, that decision will not be blindly accepted by Circuit B. Instead, judges in Circuit B may disagree with Circuit A’s reasoning and reach a different conclusion. As a result, when the same question comes up in Circuit C, judges there will benefit from having both sides of the issue developed by other courts. Indeed, a subsequent panel of Circuit A may find the disagreeing opinion persuasive and reconsider its prior holding. This doctrinal dialogue “improves the quality of legal decisions” because “[c]ircuits that have not yet ruled will then have a sharp account of the reasons for the different approaches and be in a better position to tackle the issue than they would be without such guidance.”⁹³

Another benefit of percolation is that courts can observe and compare the real-world consequences of different legal rules.⁹⁴ When two circuits adopt divergent rules, subsequent courts that have not yet decided the issue may benefit from observing the impact of each rule. Indeed, one of the two original circuits might reconsider its prior holding after comparing the effects of its rule with that of its sister circuit.

But when a government policy is subject to a nationwide injunction, it becomes exceedingly difficult, if not impossible, for other lower courts to weigh in on the issue. Federal agencies cannot get courts to decide issues in the abstract.⁹⁵ If the agency wants a court to

⁹⁰ See Bray, *supra* note 23 (manuscript at 58) (noting that disuniformity “is intrinsic in having multiple federal courts, in having a federal system, and for that matter in having a large country”).

⁹¹ RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 163 (1985).

⁹² See Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1156–57 (1990) (“[T]he doctrinal dialogue that occurs when a court of appeals addresses the legal reasoning of another and reaches a contrary conclusion also improves the quality of legal decisions.”).

⁹³ *Id.* at 1157.

⁹⁴ See Estreicher & Revesz, *supra* note 19, at 736 (“[E]xperiential dialogue occurs when courts of appeals are able to observe and compare the consequences of different legal rules. This empirical evidence is relevant both to circuits that have not yet considered an issue as well as to ones that may wish to reconsider their position.”).

⁹⁵ See, e.g., *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 586 (1972) (“It is axiomatic that the federal courts do not decide abstract questions posed by parties who lack ‘a personal stake in the outcome of the controversy.’” (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))).

pass on the validity of a policy, it must enforce the policy and wait for a regulated party to challenge it. For example, if Circuit A invalidates an EPA policy but does not issue a nationwide injunction, the EPA would continue enforcing the policy in Circuit B, wait for someone to challenge it, and Circuit B would then decide the issue, either agreeing or disagreeing with Circuit A. But if the policy is enjoined nationwide, the agency cannot enforce it, the regulated parties do not sue, and courts never hear the issue again.⁹⁶ In this case, since enforcement is enjoined nationwide (and punishable by contempt), there is no proper mechanism by which other courts can weigh in on the issue.⁹⁷ The law is frozen against the government.

B. *Weakening the Certiorari Process*

By preventing percolation and the accompanying circuit splits, nationwide injunctions reduce the likelihood that novel and difficult questions of law will reach the Supreme Court. Circuit splits—disagreement on an issue of law among different circuits—serve an important signaling function by highlighting difficult questions that would benefit from the Court’s input. Consequently, the existence of a circuit split greatly improves the likelihood of a given question receiving certiorari.⁹⁸ But by prematurely freezing the law, nationwide injunctions create a veneer of uniformity, which lessens the chances that the Supreme Court will review a given case.⁹⁹

⁹⁶ Of course, the district court’s ruling would still be subject to appeal, but, even then, unless the Supreme Court steps in, nationwide law will be largely determined by the law of a single circuit.

⁹⁷ The agency could hypothetically seek a declaratory judgment seeking reconsideration, but this approach is deeply flawed as a tool to influence changes in the law. For a comprehensive discussion of why the declaratory judgment mechanism is inadequate, see Estreicher & Revesz, *supra* note 19, at 744–46 & nn.311–14. Similarly, it is unlikely that a private party would have standing to argue that the court should change its mind. *See id.* at 737.

⁹⁸ *See* SUP. CT. R. 10 (listing circuit splits as one factor in the decision whether to grant certiorari); Adam Feldman, *The Lucky Ones: Cert Grants 2016*, EMPIRICAL SCOTUS (June 15, 2016), <https://empiricalscotus.com/2016/06/15/the-lucky-ones/> (noting that ten of the first sixteen cases to receive certiorari for the 2017 term alleged circuit splits). There is some evidence, however, that the role of circuit splits in shaping the Court’s docket is declining, possibly due to a decline in circuit splits. *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1636 (2008).

⁹⁹ There is a strong counterargument here that the existence of a nationwide injunction of serious consequence may *increase* the likelihood that certiorari is granted by virtue of its outsized impact. For example, the nationwide DAPA injunction received widespread public attention and the Supreme Court granted certiorari, ultimately affirming by an equally divided court. Nevertheless, most nationwide injunctions receive far less attention, and, therefore, likely have a lower chance of receiving certiorari absent a circuit split. This is borne out by the fact that despite the plethora of nationwide injunctions over the past few decades, the Supreme Court has yet to address the issue.

Even if the issue does reach the Supreme Court, nationwide injunctions deprive the Supreme Court of the doctrinal dialogue that aids in the Court's decisionmaking process.¹⁰⁰ As discussed above, judges and justices benefit from the ability to review divergent lower court opinions and to compare the empirical consequences of different rules. As Justice Ginsburg noted, "when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by [the Supreme] Court."¹⁰¹ Therefore, even if a nationwide injunction case does end up receiving certiorari, the Supreme Court will not have the benefit of a fully developed circuit split fleshing out the key issues.¹⁰²

C. Territorial Clashes Between Courts

By definition, nationwide injunctions impose one court's holding onto areas and people beyond its jurisdiction. This creates tension because other courts may have already upheld that very same policy, or may uphold it in pending or future litigation. An expansive injunction that goes beyond the circuit of the enjoining court encroaches on the power of other courts of appeals to say what the law is in their circuits. This encroachment also creates a risk of competing injunctions, which make it harder for the government to abide by the law.

A recent example of territorial conflict occurred in *Washington v. Trump*, when a federal court in Boston refused to enjoin the travel ban, but was functionally overruled by the nationwide injunction issued by another federal court of ostensibly equal stature.¹⁰³ For a

¹⁰⁰ See Estreicher & Revesz, *supra* note 19, at 737 ("[D]octrinal and experiential dialogue on the part of the circuits aids the Supreme Court in deciding cases on the merits. Doctrinal dialogue isolates the issues on which the courts of appeals are divided and presents the competing positions on those issues, probably stated in their most compelling terms.").

¹⁰¹ *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

¹⁰² A related problem is that nationwide injunctions force the government to appeal issues that it would not have appealed had the remedy been limited to plaintiffs. *Cf. Califano v. Yamasaki*, 442 U.S. 682, 703 (1979) (acknowledging this concern). This hampers the Solicitor General's role in choosing cases to bring before the Court. Another issue, pointed out by Professor Bray, is that if and when a nationwide injunction issue comes before the Supreme Court, it will likely be in the posture of an appeal for a stay of a preliminary injunction, which will result in the Court deciding the issue without the benefit of a developed record. Bray, *supra* note 23 (manuscript at 12).

¹⁰³ See *Louhghalam v. Trump*, No. CV 17-10154, 2017 WL 479779 at *8 (D. Mass. Feb. 3, 2017) (denying injunctive relief on the basis that plaintiffs failed to show likelihood of success on the merits); see also Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017 3:37 PM), <https://twitter.com/realDonaldTrump/status/828024835670413312> ("Why aren't the lawyers looking at and using the Federal Court decision in Boston, which is at [sic] conflict with ridiculous lift ban decision?").

less dramatic example, consider the saga of the U.S. Forest Service's Roadless Rule.¹⁰⁴ Promulgated in 2001 by the Clinton administration, the rule prohibited logging and road building in certain national forest areas.¹⁰⁵ In 2005, the Bush administration repealed the Roadless Rule and replaced it with the State Petitions Rule, which allowed for more logging activity.¹⁰⁶ In 2006, a federal district court in California held that the repeal-and-replace violated the Administrative Procedure Act.¹⁰⁷ The court enjoined the State Petitions Rule nationwide and reinstated the Roadless Rule.¹⁰⁸ However, in 2007, a federal district court in Wyoming invalidated the Roadless Rule and imposed a nationwide injunction against it.¹⁰⁹ As a result, the federal government was subject to competing injunctions—each carrying the threat of contempt—both mandating and prohibiting the reinstatement of the Roadless Rule.¹¹⁰

Some courts try to avoid comity problems by excluding from their nationwide injunctions those circuits that have upheld the challenged policy.¹¹¹ But this does not completely solve the problem because nationwide injunctions still afford far wider geographic reach to the enjoining court than to sister courts that upheld the policy. This asymmetry is neatly illustrated, outside the government context, in *United States v. AMC Entertainment*, in which the issue was whether AMC's

¹⁰⁴ For a comprehensive overview of the rule and the litigation surrounding it, see MICHAEL ANDERSON, *THE WILDERNESS SOCIETY, THE ROADLESS RULE: A TENTH ANNIVERSARY ASSESSMENT* (2011), <http://wilderness.org/sites/default/files/Roadless-Rule-paper-10th-anniversary.pdf>.

¹⁰⁵ *See id.* at 4.

¹⁰⁶ *See id.* at 4–5.

¹⁰⁷ *California ex rel. Lockyer v. USDA*, 459 F. Supp. 2d 874, 919 (N.D. Cal. 2006) (“The State Petitions Rule is set aside and the Roadless Rule . . . is reinstated.”), *aff'd*, 575 F.3d 999 (9th Cir. 2009).

¹⁰⁸ *California ex rel. Lockyer v. USDA*, 468 F. Supp. 2d 1140, 1144 (N.D. Cal. 2006) (“[F]ederal defendants are enjoined from taking any further action contrary to the Roadless Rule.”).

¹⁰⁹ *Wyoming v. USDA*, 570 F. Supp. 2d 1309, 1355 (D. Wyo. 2008) (“[T]he Court orders that the Roadless Rule . . . be permanently enjoined.”).

¹¹⁰ *See* Erin Marie Daly, *Conflicting Injunctions Muddy “Roadless Rule” Feud*, LAW360 (Oct. 10, 2008 12:00 AM), <https://www.law360.com/articles/72402/conflicting-injunctions-muddy-roadless-rule-feud> (describing the dispute). The California district court ultimately relented and narrowed the scope of its injunction due to “the unfortunate appearance of a lack of judicial comity that has arisen in the wake of the Wyoming court’s decision and the awkward position in which the United States Department of Agriculture finds itself.” *California ex rel. Lockyer v. USDA*, 710 F. Supp. 2d 916, 920 (N.D. Cal. 2008). But while this story had a relatively happy ending, the standoff would have been avoided had each court limited its injunction to its own circuit.

¹¹¹ *See, e.g., id.*; *see also* *Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 4426495, at *17 (N.D. Tex. Aug. 21, 2016) (issuing a nationwide injunction but excluding litigation then pending before other federal courts).

theater layouts violated the Americans with Disabilities Act.¹¹² The Fifth Circuit held in favor of AMC, but a federal district court in California later ruled against AMC and entered a nationwide injunction requiring AMC to modify its theater layouts throughout the country. The Ninth Circuit upheld the lower court's substantive holding, but held that comity concerns required the injunction be modified to exclude the Fifth Circuit. Consider the result that followed: Two courts of equal stature—the Fifth and Ninth Circuits—issued diverging opinions on an important legal issue, but one ruling applies in one of the circuits, while the other applies in the remaining eleven.¹¹³

D. *One-Way Ratchet Against the Government*

Nationwide injunctions create a one-way ratchet in which the law can change only against the government, not for it. As discussed above, because the government cannot disobey an injunction against an invalidated policy, it has little or no opportunity to relitigate the issue and convince the court to reconsider.¹¹⁴ As a result, rulings against the government remain frozen. At the same time, however, rulings in favor of the government remain open for reconsideration, meaning any change in the law will be against the government.¹¹⁵

Consider this example: Two courts of appeals evaluate a policy, with Circuit A upholding it and Circuit B invalidating it. Circuit B issues a nationwide injunction against the policy, perhaps exempting Circuit A because of judicial comity. Now, because the agency cannot disobey the injunction, it has no mechanism by which to bring the issue back before Circuit B and convince it to reconsider its prior holding. As a result, the law in Circuit B (and everywhere else except Circuit A) will remain frozen against the agency unless the issue reaches the Supreme Court. In the meantime, plaintiffs in Circuit A who were not part of the initial suit remain free to mount new chal-

¹¹² 549 F.3d 760 (9th Cir. 2008). The injunction in *AMC* was not against the government, and thus falls outside the ambit of this Note, but the point it illustrates applies equally to injunctions against the government.

¹¹³ One scholar even posits an unlikely “doomsday scenario” of competing injunctions: “a district court in one circuit issuing an injunction requiring the president to do *x*, a district court in another circuit issuing an injunction requiring the president not to do *x*, both appellate courts affirming, and an evenly divided Supreme Court denying both of the contending motions for an emergency stay.” Bray, *supra* note 23 (manuscript at 14). The more likely problem is less dramatic but just as serious—namely that courts step on each other's toes and make it harder for government actors to comply with the law.

¹¹⁴ See *supra* notes 96–97 (illustrating how nationwide injunctions prevent relitigation).

¹¹⁵ For example, a federal court in Boston refused to enjoin the first travel ban, but was functionally overruled by the nationwide injunction issued afterward by a federal court in Seattle. See *supra* note 103 and accompanying text (discussing the cases).

lenges against the agency in the hope of getting Circuit A to reevaluate. The result is that “only the circuit that ruled for the agency would be open to possible reconsideration of its position; rulings against the agency would be immune to such reconsideration.”¹¹⁶

This one-way ratchet imposes an asymmetrical risk on the government.¹¹⁷ Every time a government policy is challenged, the government is subjected to the same risk as a defendant in a class action suit—i.e. if the government loses, it is “liable” to the entire class in the form of a nationwide injunction. But, unlike defendants in a nationwide class action, the government does not receive the benefit of aggregated litigation—i.e. the global peace of precluding the plaintiff class from relitigating the issue¹¹⁸—because non-parties are not bound by the judgment and can continue challenging the policy until they find a sympathetic court.¹¹⁹ The plaintiffs can sue as many times as they want, but the government needs to lose only once.¹²⁰

E. *Extreme Forum Shopping*

Because nationwide injunctions give inordinate power to the first court to evaluate an issue, it incentivizes an extreme race to court-houses more inclined to issue nationwide injunctions and more sympathetic to the plaintiff’s position. While forum shopping is a ubiquitous (and perhaps defensible¹²¹) feature of our court system, it creates the impression that prevailing in the federal courts is simply a matter of

¹¹⁶ Estreicher & Revesz, *supra* note 19, at 744.

¹¹⁷ See Morley, *De Facto Class Actions*, *supra* note 24, at 494 (discussing the “asymmetric preclusion” problem).

¹¹⁸ See, e.g., *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) (explaining that the class action mechanism “was intended to insure that the judgment, whether favorable or not, would bind all class members who did not request exclusion from the suit”).

¹¹⁹ See also Brief for Petitioner at 47, *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) (No. 07-463), 2008 WL 976399 (making a similar argument).

¹²⁰ Judge Frank Easterbrook made a similar point regarding certification of nationwide class actions:

Suppose that every state in the nation would as a matter of first principles deem inappropriate a nationwide class covering [a given claim]. What this might mean in practice is something like “9 of 10 judges in every state would rule against certifying a nationwide class” . . . Although the 10% that see things otherwise are a distinct minority, one is bound to turn up if plaintiffs file enough suits—and, if one nationwide class is certified, then all the no-certification decisions fade into insignificance. A single positive trumps all the negatives.

In re Bridgestone/Firestone, Inc., Tires Prod. Liab. Litig., 333 F.3d 763, 766–67 (7th Cir. 2003).

¹²¹ See, e.g., Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 82 (1999) (defending some types of forum shopping).

gamesmanship.¹²² This problem is more acute in the nationwide injunction context because the federal government is subject to suit anywhere in the country, giving plaintiffs a rich menu of fora to choose from. Even more troubling, steering politically divisive cases to specific districts or judges threatens to paint the process of judicial review as yet another exercise in partisan politics, and even more so when that judge gets to set nationwide policy.

Many Bush-era challenges (and several early Trump-era challenges) were brought in federal district courts in California, Washington, and Hawaii, while many Obama-era challenges were brought in federal district courts in Texas.¹²³ Whether true or not, the Fifth Circuit, which reviews decisions by Texas courts, is viewed as the most conservative in the country, while the Ninth Circuit, which reviews California, Washington, and Hawaii decisions, is viewed as the most liberal one.¹²⁴

In the case of Texas, there is even evidence that lawsuits were strategically filed so they would reach specific judges.¹²⁵ Some remote districts in Texas have only one or two active judges, allowing plaintiffs to handpick the judge that will hear their case.¹²⁶ For example, the remote Wichita Falls division of the Northern District of Texas has only one active judge—Judge Reed O’Connor, who had a history of skepticism toward LGBT rights.¹²⁷ Suits brought in that division were almost certain to be heard by Judge O’Connor. Two challenges to Obama administration policies on transgender rights were brought in

¹²² See, e.g., Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 553 (1989) (“As a rule, counsel, judges, and academicians employ the term ‘forum shopping’ to reproach a litigant who, in their opinion, unfairly exploits jurisdictional or venue rules to affect the outcome of a lawsuit.”).

¹²³ See *supra* notes 55–56 (listing California and Texas cases); see also Bray, *supra* note 23 (manuscript at 9–10) (discussing this phenomenon).

¹²⁴ The Ninth Circuit’s liberal reputation may be somewhat vestigial and not entirely deserved. See John Schwartz, ‘Liberal’ Reputation Precedes Ninth Circuit, NY TIMES (Apr. 24, 2010), <https://nyti.ms/2kAwh3c> (noting that the Ninth Circuit has become more centrist). The Fifth Circuit’s reputation is somewhat more deserved, as ten of its fifteen judges were appointed by Republican presidents. See Matt Ford, *A Voter-ID Battle in Texas*, ATLANTIC (Mar. 10, 2016), <https://www.theatlantic.com/politics/archive/2016/03/texas-voter-id-fifth-circuit/473121>.

¹²⁵ Josh Blackman, *SCOTUS After Scalia*, 11 N.Y.U. J. L. & LIBERTY (forthcoming 2017) (manuscript at 40–41), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929500.

¹²⁶ *Id.*

¹²⁷ See John Council, *Why Conservative States Handpicked This Texas Judge for Transgender Bathroom Challenge*, LAW.COM (Aug. 24, 2016), <http://www.law.com/sites/almstaff/2016/08/24/why-conservative-states-handpicked-this-texas-judge-for-transgender-bathroom-challenge/?slreturn=20170527132031> (describing the litigation).

the Wichita Falls Division—both cases were decided by Judge O'Connor, and both policies were enjoined nationwide.¹²⁸

IV

NATIONWIDE INJUNCTIONS SHOULD BE DISFAVORED

As the previous two Parts show, there are strong arguments for and against nationwide injunctions. Expansive injunctions promote uniformity and efficiency, while narrower injunctions promote intercourt dialogue, enhance judicial comity, and reduce forum shopping. The case law is of little help, as circuit precedent is fragmented and the Supreme Court has yet to weigh in. So how is one to decide?

The answer lies in the design of the federal courts and the government's institutional role as a litigant. Three longstanding structural features—the regional circuits, the *Mendoza* rule, and the doctrine of intercourt nonacquiescence—entailed explicit and implicit weighing of identical competing factors, and each time the institutional architects favored percolation, dialogue, and regionalism over the uniformity and efficiency afforded by a quick-fix nationwide decision. The same policy judgment should apply to nationwide injunctions.

A. *Nationwide Injunctions Undermine the Design of the Regional Courts of Appeals*

Imagine you are designing a national court system from scratch. You could design it, as some states have, so that an opinion by any intermediate appellate court is binding on all lower courts—a system of intercourt stare decisis.¹²⁹ In such a system, a decision by the First Circuit would be binding in the Second Circuit unless and until the Supreme Court disagrees. Indeed, a host of commentators have argued that we should do just that.¹³⁰ Yet the regional structure per-

¹²⁸ *Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016) (enjoining agency's "Dear Colleague" letter on bathroom use by transgender students); *Franciscan All., Inc. v. Burwell*, No. 7:16-CV-00108-O, 2016 WL 7638311 (N.D. Tex. Dec. 31, 2016) (enjoining regulation prohibiting discrimination on the basis of gender identity or termination of pregnancy); *see also* Blackman, *supra* note 125, at 40–41 (citing other examples of suits seeking nationwide injunctions that were filed in one- or two-judge Texas districts).

¹²⁹ *See, e.g., Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 664 (N.Y. App. Div. 1984) (explaining that in New York, "the [intermediate appellate court] is a single State-wide court divided into departments for administrative convenience" and "stare decisis requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule").

¹³⁰ *See, e.g.,* POSNER, *supra* note 91, at 381 (proposing that "when the first three circuits to decide an issue have decided it the same way, the remaining circuits should defer to that decision"); Mary Garvey Algero, *A Step in the Right Direction: Reducing Intercircuit*

sists, and the federal courts of appeals are free to disregard the opinions of their sister circuits.¹³¹

The current circuit structure stems from the Evarts Act of 1891,¹³² but “[r]egional boundaries have defined the lower federal courts since their inception,” starting from the time when Supreme Court justices literally rode circuit.¹³³ Congress was aware that dividing the courts of appeals into regional circuits would create disuniformity, and thus a lack of intercircuit stare decisis was foreseeable, perhaps even inevitable, from the structure of the regional circuits.¹³⁴ This policy choice was explicitly recognized in *Mast, Foos & Co. v. Stover Manufacturing Co.*, an important post-Evarts Act case in which the Supreme Court held that one circuit is not bound by a decision of another.¹³⁵ The Court acknowledged the “substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question” but nevertheless rejected intercircuit stare decisis due to the corrective benefit of percolation, reasoning that otherwise, “the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle.”¹³⁶

The pros and cons of a regional circuit structure mirror those for nationwide injunctions. Intercircuit stare decisis would increase efficiency, as only one three-judge panel would evaluate an issue instead of twelve such panels. Intercircuit stare decisis would increase uniformity, as it would virtually eliminate circuit splits. Intercircuit stare

Conflicts by Strengthening the Value of Federal Appellate Court Decisions, 70 TENN. L. REV. 605, 609 (2003) (calling for national stare decisis by the courts of appeals for questions of statutory and procedural law); Joseph F. Weis Jr., *Disconnecting the Overloaded Circuits—A Plug for a Unified Court of Appeals*, 39 ST. LOUIS U. L.J. 455, 463 (1995) (suggesting a form of national stare decisis to make the courts of appeals “part of a harmoniously functioning national entity”); Note, *Securing Uniformity in National Law: A Proposal for National Stare Decisis in the Courts of Appeals*, 87 YALE L.J. 1219, 1239 (1978) (proposing that any en banc decision of the courts of appeals bind all other circuits).

¹³¹ See, e.g., *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 489 (1900) (holding that courts of appeals are not bound by holdings of other circuits).

¹³² Ch. 517, 26 Stat. 826 (1891) (current version at 28 U.S.C. §§ 43, 44, 46, 604, 711, 713, 961, 2101, 2106, 2107 (2012)).

¹³³ Martha Dragich, *Back to the Drawing Board: Re-examining Accepted Premises of Regional Circuit Structure*, 12 J. APP. PRAC. & PROCESS 201, 201 (2011).

¹³⁴ There is room for debate on whether the Evarts Act actively intended to establish the “law of the circuit” doctrine. Compare Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 686 (1984) (“Congress may never have intended that the concept of law of the circuit develop, but something of the sort was inevitable because the Evarts Act directed each court of appeals to interpret federal law independently.”) (citation omitted), with Slack, *supra* note 25, at 969 (“[T]he freedom for the lower courts to disagree was not a legislative accident.”).

¹³⁵ 177 U.S. at 488–89.

¹³⁶ *Id.* at 488.

decisis would likewise afford more complete relief to litigants, unlike the current system where a litigant may have a legal right under the law of one circuit but may lack that right under the law of another circuit.

Despite these benefits, however, Congress created and maintained a system without intercircuit stare decisis because percolation and intercircuit dialogue lead to more reasoned and durable decisions.¹³⁷ In the long term, of course, national uniformity is desirable, which is why the Supreme Court focuses on resolving circuit splits. But the regional structure intentionally sacrifices short-term uniformity for the sake of more accurate decisionmaking, the idea being that intercircuit dialogue will enhance the decisions of the circuit courts and, if necessary, inform the ultimate decision of the Supreme Court.¹³⁸ That regionalism has prevailed for over a century is a testament to the policy choice that percolation and intercircuit dialogue are more valuable—in the short term—than efficiency, immediate uniformity, and complete relief.¹³⁹

This congressional policy choice is further evident in the existence of specialized federal courts and exclusive jurisdiction statutes. Dozens of statutes grant exclusive jurisdiction to the D.C. Circuit over certain areas of administrative law, in part due to a congressional belief that, for those areas of the law, it “is more efficient to have a single court provide guidance about administrative proceedings” so that “a federal agency regulating on a national scale need tailor its action to only one body of precedent, rather than to a patchwork of potentially conflicting cases in multiple circuits.”¹⁴⁰ Likewise, the Federal Circuit has exclusive jurisdiction over patent law due to “the need

¹³⁷ See Revesz, *supra* note 92, at 1116 (“[I]mplicit in the lack of intercircuit stare decisis is a view about the benefits of percolation.”).

¹³⁸ See Samuel Estreicher & Richard L. Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply*, 99 YALE L.J. 831, 834 (1990) (“The rejection of intercircuit stare decisis is premised upon—and given the obvious costs in deferring uniformity, is explainable only in terms of—the benefits of dialogue among the circuits.”). Further support is provided by the fact that Supreme Court review is discretionary rather than a mandatory review of circuit splits, which “reinforces congressional awareness that circuit splits will not only exist, but will go unresolved until the issue is sufficiently mature to warrant Supreme Court review.” Slack, *supra* note 25, at 970.

¹³⁹ See ESTREICHER & SEXTON, *supra* note 88, at 48 (“It may be that such disuniformity was an unintended byproduct of a geographically dispersed, decentralized judicial structure; but it is a feature that has endured . . . because the system’s commitment to uniformity is qualified by a policy in favor of intercircuit experimentation.”).

¹⁴⁰ Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL’Y 131, 145 (2013); see also Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 84 (1990) (“Where the desire for uniformity is especially strong, federal jurisdiction may be made exclusive.”).

to promote the internal coherence of patent law.”¹⁴¹ For those areas of law, Congress made the policy judgment that the need for immediate nationwide uniformity outweighs the benefits of percolation and intercircuit dialogue, and therefore vested nationwide jurisdiction in a specific court. These exceptions further suggest that except for certain specialized areas, Congress favors percolation, dialogue, and regionalism even at the cost of short-term disuniformity.

Nationwide injunctions create an end-run around this regional structure. By enjoining a government policy throughout the country, a single lower court makes de facto nationwide law, prevents intercircuit dialogue, threatens judicial comity, and undermines an important congressional policy choice.

B. *Nationwide Injunctions Subject the Government to De Facto Issue Preclusion*

In *United States v. Mendoza*, the Supreme Court held that the federal government is not subject to non-mutual issue preclusion, meaning it is free to relitigate issues it previously lost.¹⁴² In two prior cases, the Court had given its blessing to non-mutual issue preclusion against private parties, recognizing that it would serve interests of finality and judicial economy.¹⁴³ For example, if A and B litigate issue *x* and A loses, A could be precluded from relitigating *x* in a subsequent litigation with C. The plaintiff in *Mendoza* sought to apply this doctrine to the government and preclude it from relitigating an issue it had lost in a prior litigation.

The *Mendoza* Court, however, refused to subject the government to non-mutual issue preclusion, holding that the government’s role as a litigant “is sufficiently different from the conduct of private civil litigation” and therefore “[the] economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which peculiarly affect the Government.”¹⁴⁴

The systemic policy considerations weighed in *Mendoza* mirror the key policy considerations on nationwide injunctions. The Court’s analysis framed the issue as pitting uniformity and efficiency against percolation and intercircuit dialogue. On one side, there was the

¹⁴¹ Revesz, *supra* note 92, at 1167; *see also id.* at 1167 n.207 (reviewing legislative history of the creation of the Federal Circuit).

¹⁴² 464 U.S. 154, 162–63 (1984). “Issue preclusion” used to be called “collateral estoppel.” *See id.* at 158 n.3.

¹⁴³ *See* *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979) (allowing non-mutual offensive issue preclusion); *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 333–34 (1971) (allowing non-mutual defensive issue preclusion).

¹⁴⁴ *Mendoza*, 464 U.S. at 163.

interest in “afford[ing] a litigant only one full and fair opportunity to litigate an issue,”¹⁴⁵ “reliev[ing] parties of the cost and vexation of multiple lawsuits,” “conserv[ing] judicial resources,” “preventing inconsistent decisions,” and “encourag[ing] reliance on adjudication.”¹⁴⁶ On the other side was the concern that precluding the government “would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue,” and “deprive [the Supreme] Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before [it] grants certiorari.”¹⁴⁷

The *Mendoza* Court unanimously held that when the government is a litigant, the benefits of percolation outweigh the competing benefits of a quick, cost-effective, and uniform nationwide decision because percolation “better allow[s] thorough development of legal doctrine by allowing litigation in multiple forums.”¹⁴⁸ Thus, after *Mendoza*, if Paula Plaintiff challenges an EPA policy and the First Circuit rules for Paula, the EPA cannot relitigate the issue with Paula but can relitigate it with everyone else.¹⁴⁹

Nationwide injunctions circumvent this holding because, as discussed above, they make it very difficult for the government to relitigate an issue before another court.¹⁵⁰ Without an opportunity to relitigate, the government is subjected to de facto issue preclusion, directly contrary to *Mendoza*.¹⁵¹

C. *Nationwide Injunctions Prohibit Accepted Forms of Agency Nonacquiescence*

The rejection of intercircuit stare decisis and the *Mendoza* holding combine to create the doctrine of nonacquiescence, defined as “[a]n agency’s policy of declining to be bound by lower-court prece-

¹⁴⁵ *Id.* at 159 (quoting *Standefer v. United States*, 447 U.S. 10, 24 (1980)).

¹⁴⁶ *Mendoza*, 464 U.S. at 158 (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

¹⁴⁷ *Id.* at 160. The Court was also concerned that issue-precluding the government would interfere with the signaling function served by circuit splits. *See id.* (“[I]f nonmutual estoppel were routinely applied against the Government, this Court would have to revise its practice of waiting for a conflict to develop before granting the Government’s petitions for certiorari.”). This concern applies equally to nationwide injunctions, as discussed in Section III.B.

¹⁴⁸ *Id.* at 163.

¹⁴⁹ In *Mendoza*’s companion case, the Court held that the government is subject to issue preclusion in subsequent litigation with the same party as the original litigation. *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 169 (1984).

¹⁵⁰ *See supra* notes 96–97 and accompanying text.

¹⁵¹ *See* L.A. Haven Hospice, Inc. v. Sebelius, 638 F.3d 644, 664 (9th Cir. 2011) (citing *Mendoza* in reversing a nationwide injunction); *Virginia Soc’y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (same).

dent that is contrary to the agency's interpretation of its organic statute, but only until the Supreme Court has ruled on the issue."¹⁵²

There are several types of nonacquiescence, but two are relevant for our purposes: *intercircuit* nonacquiescence and *intracircuit* nonacquiescence. Intercircuit nonacquiescence occurs when "the agency refuses to follow the case law of a court of appeals other than the one that will review its decision."¹⁵³ For example, Circuit A invalidates an agency policy, and the agency continues to enforce the policy in Circuit B. Intracircuit nonacquiescence occurs when "the agency refuses to follow the case law of the court of appeals that will review its decision."¹⁵⁴ For example, Circuit A invalidates an agency policy, and the agency continues to enforce the policy in Circuit A.

In "[t]he seminal academic discussion of agency nonacquiescence,"¹⁵⁵ Professors Estreicher and Revesz evaluate the desirability and legitimacy of both types of nonacquiescence.¹⁵⁶ They conclude that "an agency's ability to engage in intercircuit nonacquiescence should not be constrained."¹⁵⁷ As with nationwide injunctions, they note that "[i]f an agency must conform its policy nationwide to an adverse ruling by a court of appeals, it becomes exceedingly difficult, if not impossible," to relitigate the issue, which would hinder intercircuit dialogue, impede the certiorari process, create a one-way ratchet against agencies, contravene the structure of the regional courts of appeals, and undermine *Mendoza's* holding.¹⁵⁸ As to intracircuit nonacquiescence, they conclude that it is appropriate only in a limited number of cases and "can be justified only as an interim measure that allows the agency to maintain a uniform administration of its governing statute while it makes reasonable attempts to persuade the courts to validate its position."¹⁵⁹

¹⁵² *Nonacquiescence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹⁵³ Estreicher & Revesz, *supra* note 19, at 683.

¹⁵⁴ *Id.*

¹⁵⁵ *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16, 22 n.4 (D.C. Cir. 2016).

¹⁵⁶ As a threshold matter, Estreicher and Revesz conclude that nonacquiescence is not per se unconstitutional because it violates neither separation of powers nor due process. See Estreicher & Revesz, *supra* note 19, at 718–32. Scholars have engaged in critical conversation with this reasoning. Compare Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801 (1990) (arguing against intercircuit nonacquiescence), with Estreicher & Revesz, *supra* note 138 (responding to objections). But see Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 MINN. L. REV. 1339 (1991) (arguing that intracircuit nonacquiescence is unconstitutional).

¹⁵⁷ Estreicher & Revesz, *supra* note 19, at 735–36.

¹⁵⁸ *Id.* at 737.

¹⁵⁹ *Id.* at 743. This argument in favor of intracircuit nonacquiescence has been viewed as persuasive by numerous courts. A recent example is *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16 (D.C. Cir. 2016), in which both the majority and dissent appeared to

While the idea that an agency can keep doing something that a federal court held unlawful might come as a surprise to some, inter-circuit nonacquiescence is commonplace, and its legitimacy is widely accepted by courts and commentators.¹⁶⁰ The practice of nonacquiescence is as old as the administrative state itself, going back to the 1930s.¹⁶¹ Because there is no inter-circuit stare decisis, the agency is not acting inconsistently with the law when applying a policy in Circuit B that was held invalid in Circuit A.¹⁶² Intracircuit nonacquiescence, however, is far more controversial, and its use by agencies was (and, to a lesser extent, still is) a source of tension between agencies and courts.¹⁶³

For our purposes, however, we need to consider only inter-circuit nonacquiescence—the “well-settled principle” that a holding in Circuit A does not regulate the agency’s conduct in Circuit B.¹⁶⁴ Nationwide injunctions flatly prohibit inter-circuit nonacquiescence. In doing so, nationwide injunctions contravene the cost-benefit analysis made by Professors Estreicher and Revesz and accepted explicitly and implicitly by numerous courts.¹⁶⁵ Like the policy judgments in *Mendoza* and the regional circuit structure, the acceptance of inter-cir-

agree with the approach advocated by Professors Estreicher and Revesz but disagreed over whether the agency had acted in good faith. See *id.* at 22, for the majority’s reliance on Estreicher and Revesz.

¹⁶⁰ See, e.g., *Indep. Petroleum Ass’n of Am. v. Babbitt*, 92 F.3d 1248, 1261 (D.C. Cir. 1996) (“[I]nter-circuit nonacquiescence is permissible, especially when the law is unsettled.”); Coenen, *supra* note 156, at 1348 n.23 (“The legality of inter-circuit nonacquiescence is widely accepted.”); Diller & Morawetz, *supra* note 156, at 802 n.8 (conceding that “[i]nter-circuit nonacquiescence has not been very controversial and has not led to criticism from the courts”).

¹⁶¹ See Estreicher & Revesz, *supra* note 19, at 681 (noting the historical practice of nonacquiescence).

¹⁶² *Id.* at 719.

¹⁶³ Courts were reluctant to accept intracircuit nonacquiescence, and judges in the 1970s and ‘80s vigorously condemned the practice, characterizing it as “outside the law,” *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979), “intolerable,” *Ithaca Coll. v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980), “thinly veiled defiance,” *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366, 382 (D.C. Cir. 1983), “contumacious,” *Beverly Enters. v. NLRB*, 727 F.2d 591, 593 (6th Cir. 1984), “pernicious, almost frightening lawlessness,” *Wilkerson v. Sullivan*, 727 F. Supp. 925, 938 (E.D. Pa. 1989), and “[like] Governor Faubus at Little Rock,” *Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1092 (D.C. Cir. 1992).

¹⁶⁴ *Right to Life of Dutchess Cty., Inc. v. FEC*, 6 F. Supp. 2d 248, 253 (S.D.N.Y. 1998).

¹⁶⁵ Many cases in virtually every circuit cite Estreicher and Revesz as the authority on nonacquiescence. See, e.g., *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16, 22 (D.C. Cir. 2016); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015); *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1133 n.1 (9th Cir. 2003); *NLRB v. Goodless Bros. Elec. Co.*, 285 F.3d 102, 107 n.4 (1st Cir. 2002); *U.S. Dep’t of Energy v. Fed. Labor Relations Auth.*, 106 F.3d 1158, 1168–69 (4th Cir. 1997); *Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1092 (7th Cir. 1994); *Ruppert v. Bowen*, 871 F.2d 1172, 1177 (2d Cir. 1989).

cuit nonacquiescence embodies a systemic choice that the benefits of intercircuit dialogue outweigh the efficiency and uniformity of a quick and cheap nationwide decision.¹⁶⁶ Nationwide injunctions turn that policy judgment on its head.

V

INJUNCTIONS AGAINST THE FEDERAL GOVERNMENT SHOULD NOT EXCEED THE REGIONAL CIRCUIT OF THE ENJOINING COURT

This Note proposes a bright-line solution: Injunctions against the federal government should not extend beyond the circuit where the enjoining court sits (the “circuit-border rule”). In many cases, an injunction barring enforcement against the plaintiff alone will suffice. But even when a court thinks a broader injunction is necessary, it should not encroach onto other circuits. For example, if Peter Plaintiff challenges an EPA emissions cap in the District of Maine and wins, the EPA can be enjoined from enforcing the cap against Peter. If the district court decides that an injunction focused solely on Peter would be ineffectual, it can broaden the scope of the injunction up to the borders of the First Circuit but no further.

A. *The Need for a Geographic Limitation*

The circuit-border rule has three components: (1) injunctions should be limited to plaintiffs whenever practicable, (2) there should be no nationwide injunctions, and (3) if a broader, geographic injunction is necessary, it should not exceed the circuit border of the enjoining court. The first and second components are not revolutionary, and echo what other commentators have advocated.¹⁶⁷ The third component, however, draws a bright line at the circuit border, a line not traditionally part of injunctive practice.¹⁶⁸ But while this line

¹⁶⁶ Some courts rejected nonacquiescence-based arguments against nationwide injunctions but did so without really engaging with the doctrine. *See, e.g., California ex rel. Lockyer v. U.S. Dep’t of Agric.*, 468 F. Supp. 2d 1140, 1144 (N.D. Cal. 2006) (affirming a nationwide injunction on grounds that nationwide scope was necessary for complete relief), *aff’d*, 575 F.3d 999 (9th Cir. 2009); *Am. Min. Cong. v. U.S. Army Corps of Eng’rs*, 962 F. Supp. 2, 5 (D.D.C. 1997) (same).

¹⁶⁷ *See Bray, supra* note 23 (manuscript at 51) (proposing that “[a] federal court should give an injunction that protects the plaintiff vis-à-vis the defendant, wherever the plaintiff and the defendant may both happen to be. The injunction should not constrain the defendant’s conduct vis-à-vis non-parties”).

¹⁶⁸ Professor Morley suggested an analogous circuit-border limitation in the context of 23(b)(2) class actions, but this Note is the first to suggest it for nationwide injunctions. *See Morley, De Facto Class Actions, supra* note 24, at 554–56; Morley, *Nationwide Injunctions, supra* note 25, at 653–54.

is new, it is firmly grounded in the principles that necessitate drawing the line in the first place.

At its core, the circuit-border rule is derived from the regional circuits, which balance the need for uniformity with the benefits of regional percolation.¹⁶⁹ The regional circuits embody a congressional policy judgment that they are large enough to create regional uniformity yet distinct enough to foster genuine percolation and intercircuit dialogue, thus striking an equilibrium between these competing values. The circuit-border rule does the same. Drawing the boundaries at the circuit border also ensures that every state can get an injunction that covers its entire territory, echoing the congressional choice that no state be split between two circuits.¹⁷⁰ In an era where many high-profile administrative law challenges are brought by states,¹⁷¹ this line ensures that state plaintiffs can receive comprehensive relief even if the injunction is limited to the circuit borders.

The other two institutional structures whose policy choices counsel against nationwide injunctions—*Mendoza* and nonacquiescence—also support the circuit-border rule. The nature of the regional circuits features prominently in *Mendoza*, which focused on the ability of the regional courts of appeals to disagree with each other.¹⁷² The circuit borders likewise play a significant role in the nonacquiescence doctrine, evidenced by the broad acceptance of intercircuit nonacquiescence compared to the lukewarm acceptance of intracircuit nonacquiescence.¹⁷³ Courts recognize that the circuit borders are the edge of their domain: within the circuit, their word is the law; outside it, their opinions deserve “respectful consideration” but not much else.¹⁷⁴

A laudable recent example of a geographically limited injunction is *Aziz v. Trump*.¹⁷⁵ In that case, the district court invalidated

¹⁶⁹ See *supra* Section IV.A.

¹⁷⁰ See Arthur D. Hellman, *Legal Problems of Dividing a State Between Federal Judicial Circuits*, 122 U. PA. L. REV. 1188, 1189 (1974) (stating that since 1891, “each state has always been included wholly within a single circuit”).

¹⁷¹ See Henry Gass, *Attorneys General Embrace Role as Check on Executive Power, on Right and Left*, CHRISTIAN SCI. MONITOR (Dec. 21, 2016), <https://www.csmonitor.com/USA/Justice/2016/1221/Attorneys-general-embrace-role-as-check-on-executive-power-on-right-and-left> (describing rise in suits by state attorneys general).

¹⁷² *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (discussing importance of divergent lower court opinions).

¹⁷³ See *supra* note 160 (citing sources acknowledging the legitimacy of intercircuit nonacquiescence); *supra* note 163 (citing cases chastising agencies for engaging in intracircuit nonacquiescence); see also Estreicher & Revesz, *supra* note 19, at 735–64 (arguing in favor of a limited form of intracircuit nonacquiescence).

¹⁷⁴ *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987) (Posner, J.).

¹⁷⁵ No. 117-CV-116, 2017 WL 580855, (E.D. Va. Feb. 13, 2017).

President Trump's first travel ban but enjoined the government only from enforcing the policy in Virginia. The judge did this, in part, to "avoid encroaching on the ability of other circuits to consider the questions raised."¹⁷⁶ Similarly, a federal judge in Wisconsin struck down the revised travel ban but limited the injunction to the family that filed the suit.¹⁷⁷ These rulings ensured that justice was done while honoring the geographic limits of the lower federal courts.

One narrow exception to the circuit-border rule is when a district court certifies a nationwide class action against the federal government. This exception is consistent with the Supreme Court's holding in *Califano v. Yamasaki* that nationwide class actions are not per se improper, even if they require nationwide relief.¹⁷⁸ Instead, the Court held that the district court "should take care to ensure that nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts."¹⁷⁹ While nationwide class actions implicate many of the concerns that apply to nationwide injunctions, and there are strong arguments against their use,¹⁸⁰ the case against nationwide class actions is not as strong as the case against nationwide injunctions. The class action is specifically designed to afford relief to a broad swath of people beyond the named plaintiffs, and judges take great care to ensure that aggregated adjudication is appropriate.¹⁸¹ Moreover, a nationwide class action precludes relitigation by absent class members, mitigating the one-way ratchet problem of nationwide injunctions. For these reasons, the bright-line

¹⁷⁶ *Id.* at *10 (quoting *Virginia Soc'y for Human Life v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (internal quotation marks omitted)).

¹⁷⁷ See Josh Gerstein, *Revised Trump Travel Ban Suffers First Legal Blow*, POLITICO (Mar. 10, 2017, 1:17 PM), <http://www.politico.com/story/2017/03/trump-travel-ban-court-hearing-235927> (noting that the injunction against the travel ban issued by a Wisconsin judge "is limited to the individuals involved in the case").

¹⁷⁸ 442 U.S. 682, 702–03 (1979).

¹⁷⁹ *Id.* at 702.

¹⁸⁰ See Slack, *supra* note 25, at 987 (arguing for a presumption against nationwide class actions).

¹⁸¹ See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985) (describing the class action as "an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the litigation was too great to permit joinder. The absent parties would be bound by the decree so long as the named parties adequately represented the absent class. . . .") (citing *Hansberry v. Lee*, 311 U.S. 32, 41 (1940)); see also *Milbourne v. JRK Residential Am., LLC*, No. 3:12CV861, 2016 WL 1071564, at *8 (E.D. Va. Mar. 15, 2016) ("It is well-settled that 'the class certification decision is generally the most important aspect of a class action case. . . .'" (citing ALBA CONTE & HERBERT NEWBERG, *NEWBERG ON CLASS ACTIONS* § 7.18 (5th ed. 2013)).

rule against nationwide injunctions becomes paler when a nationwide class action is certified.¹⁸²

A key difference between this Note and other commentators is that it opposes nationwide injunctions even when doing so diminishes the relief afforded to meritorious plaintiffs. Under the circuit-border rule, Texas would be unable to get a nationwide injunction against DAPA, nor could the state of Washington against the Trump travel ban. As a result, Texas and Washington—despite prevailing on the merits—might still feel some residual injury because the challenged policy would be enforceable in other circuits.

In contrast to this Note's geographic line, other commentators draw lines based only on party status. Professor Samuel Bray proposes a rule that "[a] federal court should give an injunction that protects the plaintiff vis-à-vis the defendant, wherever the plaintiff and the defendant may both happen to be. The injunction should not constrain the defendant's conduct vis-à-vis non-parties."¹⁸³ For example, according to Professor Bray, the DAPA injunction should have covered only the twenty-six plaintiff states instead of all fifty.¹⁸⁴ Zayn Siddique likewise proposes that "a nationwide injunction should not issue unless it is necessary to provide complete relief to the plaintiffs."¹⁸⁵ The common denominator in these approaches is that courts may issue broad injunctions in order to completely redress the plaintiff's injury, but should not award relief to anyone other than the plaintiff.

The problem with rules that focus purely on party status is that they are easily circumvented by groups of states or by industry groups suing on behalf of their members. For example, in *National Federation of Independent Businesses v. Perez*, ten states and several nationwide industry groups sued jointly and obtained a nationwide injunction against a Department of Labor rule.¹⁸⁶ If a court were to tailor its injunction so as to provide complete relief to all the plaintiffs, its injunction would have to cover all members of the industry groups—

¹⁸² See also Morley, *De Facto Class Actions*, *supra* note 24, at 554–56 (proposing that nationwide injunction cases should instead be brought through a class action mechanism). In a recent work, Professor Morley makes a compelling case that *Yamasaki* is inconsistent with *Mendoza* and that *Yamasaki*'s embrace of the nationwide class action should be reconsidered. Morley, *Nationwide Injunctions*, *supra* note 25, at 622 (“[T]he same structural considerations underlying *Mendoza* should lead the Court to reconsider [*Yamasaki*’s] approval of nationwide classes.”).

¹⁸³ Bray, *supra* note 23 (manuscript at 51).

¹⁸⁴ See *id.* (manuscript at 2, 52).

¹⁸⁵ Siddique, *supra* note 26 (manuscript at 40).

¹⁸⁶ No. 5:16-CV-00066-C, 2016 WL 3766121, at *1–2 (N.D. Tex. June 27, 2016) (listing plaintiffs and intervenor-plaintiffs).

nationwide—plus the entire territory of the ten plaintiff states. In another nationwide injunction case, *Franciscan Alliance, Inc. v. Burwell*, the key plaintiff was an association representing 18,000 Christian medical professionals all over the country.¹⁸⁷ In addition to the practical difficulty of determining just who is part of the plaintiff group, such purely plaintiff-oriented injunctions retain most of the disadvantages of nationwide injunctions—one court imposing its holding outside its jurisdiction, territorial clashes, and forum shopping. Moreover, consider the DAPA injunction, where twenty-six states were plaintiffs. Even if the injunction were limited to only the plaintiffs, the holding of one district court would still be binding in most of the country. For these reasons, a limitation based on geography rather than party status is more effective, is easier to apply, and better protects the core values behind percolation and regional decisionmaking.

B. *Alternative Avenues to Complete Relief*

The circuit-border rule leaves in place other vehicles to deliver relief to meritorious plaintiffs. In many cases, a circuit-wide injunction might have nationwide effect as a practical matter. For example, if the *Washington v. Trump* injunction were limited to the Ninth Circuit or the state of Washington, those affected by the executive order could simply enter the United States through West Coast airports, rendering the executive order functionally inoperative while respecting the regional structure of the federal courts. Even in less extreme circumstances, the government might find it too difficult or costly to follow two different standards, and will voluntarily modify its nationwide policy in accordance with the enjoining court.¹⁸⁸ Additionally, the class action remains a viable option to obtain broad—perhaps even nationwide—relief for parties aggrieved by government conduct.¹⁸⁹

At most, the circuit-border rule requires that plaintiffs seeking to halt a nationwide policy sue in twelve courts instead of one.¹⁹⁰ In the DAPA litigation, for example, instead of twenty-six states filing suit in Texas seeking a nationwide injunction, there would be smaller groupings in each of the circuits—Maine would file suit seeking an injunction covering the First Circuit, Texas the Fifth Circuit, Nevada the

¹⁸⁷ No. 7:16-CV-00108-O, 2016 WL 7638311, at *5 (N.D. Tex. Dec. 31, 2016).

¹⁸⁸ See *Zepeda v. INS*, 753 F.2d 719, 729 n.1 (9th Cir. 1983) (narrowing an overbroad injunction, but noting that “as a *practical* (but not legal) matter, the INS may have to end its challenged practices entirely to avoid the possibility of violating the injunction and being sanctioned for contempt”), *amended by*, 753 F.2d 719 (9th Cir. 1985).

¹⁸⁹ See *Morley, De Facto Class Actions*, *supra* note 24, at 553–56 (arguing that all defendant-oriented injunctions go through a modified 23(b)(2) class action mechanism).

¹⁹⁰ Assuming, of course, that the issue does not reach the Supreme Court in the meantime.

Ninth, and so on. This approach may seem inefficient, but it already happens every time there is an emerging legal issue—i.e. every court of appeals has a chance to evaluate it and to set a rule that governs within that circuit. As discussed above, this siloed approach is justified by the importance and difficulty of the legal issue involved and the values inherent in the regional structure of the federal courts. Moreover, it mitigates the problems of forum selection and territorial clashes because the law in each circuit will actually be determined by a court sitting in that circuit.

The circuit-border rule certainly makes it harder for those opposed to the government's agenda. The rule removes a potent tool—the nationwide injunction—that swiftly neutralizes unconstitutional and unjust policies. Sweeping injunctions may seem especially appropriate in the current political climate given that conservatives employed them so successfully to obstruct the Obama administration's agenda. In the long run, however, the structure and integrity of the federal courts are more important than the outcome of an individual case or two. Nationwide injunctions, and the attendant forum shopping and territorial clashes, only deepen the public perception that judges are partisan actors, which works to undermine the courts' crucial role as a check on executive power. It is very difficult to maintain, in a principled way, that the DAPA injunction was wrong but the travel ban injunction right, and vice versa. This Note takes the position that both were wrong.¹⁹¹

C. *Implementing the Circuit-Border Rule*

The best way to implement the circuit-border rule is for the Supreme Court to adopt it using its oversight power over the lower federal courts and its appellate power over equitable remedies. Just as the Court established the tests for preliminary and permanent injunctions, the *Yamasaki* rule, and the *Mendoza* rule, the Court could prohibit nationwide injunctions against the federal government. The Court will likely have the opportunity to evaluate this issue, when it decides the travel ban cases.¹⁹²

Supreme Court intervention is especially important here because there is a collective action problem if the issue is left to the lower courts. If the court of appeals for Circuit A prohibited its district

¹⁹¹ See generally Getzel Berger, Opinion, *Nationwide Injunctions Are Wrong—Even when They Stop Trump*, L.A. TIMES (May 12, 2017, 4:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-berger-injunctions-lower-federal-courts-judges-20170512-story.html>.

¹⁹² See *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017), cert. granted, *Trump v. Int'l Refugee Assistance Project*, 85 U.S.L.W. 4477 (U.S. June 26, 2017) (Nos. 16-1436 and 16-1540) (per curiam) (granting certiorari over the travel ban cases).

courts from issuing nationwide injunctions, it would only exacerbate the problem of forum shopping because plaintiffs would simply file suit in Circuit B. As long as plaintiffs have a single circuit hospitable to nationwide injunctions, it negates the exercise of restraint by all other circuits. While courts can and should limit the scope of their injunctions in individual cases, large-scale solutions will be ineffective unless they bind all lower courts. The Supreme Court is in the best position to do that.¹⁹³

CONCLUSION

This Note has two goals. At its most ambitious, it seeks to discourage lower federal courts from enjoining the federal government beyond their circuit borders. At a minimum, it aims to inform the line-drawing choices inherent in the issuance of injunctions by highlighting the advantages and disadvantages of nationwide injunctions. While affording complete relief to meritorious plaintiffs is important and just, nationwide injunctions undermine the structural design of the federal courts by allowing a single lower court to make nationwide law. In doing so, they undermine the important values behind the regional circuits—percolation, intercircuit dialogue, and the notion that only the Supreme Court can make nationwide law. One can quibble with the regional organization of the federal courts or the special treatment of the government as a litigant, but as long as we have this structure, it is incompatible with nationwide injunctions against the federal government.

¹⁹³ Another option, though one less likely to happen, is for the circuit-border rule to be codified in the Federal Rules of Civil Procedure. See Siddique, *supra* note 26 (manuscript at 39–40) (proposing an amendment to Rule 65). Yet another option is for the circuit-border rule to be codified by statute. See, e.g., 28 U.S.C. § 2282 (1970) (repealed 1976) (prohibiting federal courts from enjoining federal laws based on unconstitutionality unless adjudicated by a three-judge panel).